United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR PETITIONERS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,256 **6011**

ESTATE OF MIGIEL JOHN ULINE, Deceased,
M. ULINE PRATT and ELIZABETH R. STINE, Executrices,

Petitioners,

v.

DISTRICT OF COLUMBIA,

Respondent.

Petition to Review Decision of the District of Columbia Tax Court

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QUESTIONS PRESENTED

1. Whether the Tax Court erred in holding, purportedly in reliance upon Berliner v. District of Columbia, 103 U.S. App. D.C. 351, 258 F. 2d 651 (1958), that an estate's tax basis for stock which it acquired from decedent in a corporation which was subsequently liquidated and dissolved must be disregarded in determining the extent to which the estate derived gain, profit or income from the liquidating dividend.

2. Whether, if the Tax Court properly held that the estate was required to include in its gross income as a dividend the entire accumulated earnings of the liquidated corporation regardless of the fact that part of this amount was a recoupment of the basis for its stock, it erred in refusing to allow the estate to offset against this income the amount by which its basis for the cancelled stock exceeded the non-dividend portion of the liquidating distribution.

INDEX

TABLE OF CASES

STATUTES, RULES AND MISCELLANEOUS AUTHORITIES

* Cases and authorities principally relied upon are marked by asterisks.

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BRIEF FOR PETITIONERS

JURISDICTIONAL STATEMENT

On April 11, 1963, pursuant to Section 47-1593 of the District of Columbia Code (1961 Ed.), petitioners filed an appeal in the District of Columbia Tax Court from an assessment dated January 14, 1963 of a deficiency in income taxes against the Estate of Migiel J. Uline, of which petitioners are executrices. The tax was paid by the Estate on January 29, 1963 and refund was sought in the Tax Court. (J.A. 7.)

The decision of the District of Columbia Tax Court of which review is sought was rendered on September 30, 1963 (J.A. 44). A petition to review that decision was filed in the Tax Court on October 24, 1963 (J.A. 44). Jurisdiction of this Court is invoked under Section 47-2404, District of Columbia Code (1961 Ed.).

STATEMENT OF THE CASE

A deficiency was assessed against the estate of Migiel John Uline, deceased, for District of Columbia income taxes for the calendar year 1960 in the amount of $31,805.03 (plus interest of $3,339.55). Petitioners, executrices of the estate, paid the deficiency and sued for refund in the District of Columbia Tax Court. This appeal is taken from the adverse decision of the Tax Court in so far as it held that amounts received by the estate as distributions in complete liquidation of a corporation in which it held stock were includible in the gross income of the estate to the full extent of the corporate surplus, and that the estate's basis for the stock was irrelevant. [1]

The facts with respect to the issue on this appeal are undisputed. As stipulated by the parties and found by the Tax Court, they are as follows:

M. J. Uline Company, an Ohio corporation, was engaged for many years in the manufacture and sale of ice and the operation of an arena in

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[1] The case below included a second issue which dealt with the tax treatment of certain withdrawals made by the decedent from the corporation. The Tax Court's decision adverse to petitioners on that issue is not being challenged in this appeal.

Although the record does not contain a breakdown of the deficiency of $31,805.03 and interest as between the two issues, in view of the fact that $555,591.82 of additional income was asserted with respect to the issue on which review is sought and only $80,508.69 with respect to the other issue, it is apparent that the major portion of the deficiency is being challenged in this appeal.

the District of Columbia (J.A. 8). The corporation had been organized by Migiel John Uline. At the time of his death on February 22, 1958, he was the owner of all its outstanding capital stock (J.A. 35).

On December 16, 1959, the Board of Directors adopted a plan of complete liquidation and dissolution of the corporation, pursuant to which they undertook to sell the businesses in which the corporation was engaged and to distribute the proceeds (after payment of corporate liabilities) to the estate in cancellation and redemption of the stock held by the estate (J. A. 8, 37). Accordingly, a contract to sell all the tangible assets used in the businesses to Uline, Inc., a new corporation organized by a Mr. Harry Lynn, was entered into on December 16, 1959 (J.A. 8). The purchase price of $725,000 was payable partly in cash and partly in notes due over a 12-year period (J.A. 9). The sale was consummated on December 31, 1959 (J.A. 8).

On May 3, 1960, a partial liquidating distribution was made by M. J. Uline Company to Mr. Uline's estate (J.A. 9). A final liquidating distribution was made on December 14, 1960, at which time petitioners surrendered for cancellation the certificates held by them representing 1053 shares of stock comprising all the capital stock of the corporation (J.A. 9, 10). On December 28, 1960, a certificate of dissolution of M. J. Uline Company was filed with the Secretary of State of Ohio, thereby completing dissolution of the corporation (J.A. 11).

The total liquidating distribution which aggregated $689,836.47 consisted of the following items (J. A. 10):

May 3, 1960 distribution:

Cash	$183,000.00
Less Real Estate Tax Deposit	2,746.04

Net Cash Distribution	$180,253.96
Balance Due on Notes of Uline, Inc.[2]	445,130.86
Net Distribution of May 3, 1960	$625,384.82

December 14, 1960 Distribution:

Cash	$ 70,747.97	
By Payment of Estate Obligation to Ernst & Ernst	325.00	
Total Distribution	$ 71,072.97	

Less Corporate Liabilities Assumed by Estate:

1960 Federal and D.C. Income and Franchise Taxes	$ 2,508.74	
1959 and 1958 Federal and D.C. tax deficiencies	3,894.73	
Acct. Payable-Clock Repair	217.85	
	$ 6,621.32	

Net Distribution of December 14, 1960	$ 64,451.65
Total Net Distribution	$689,836.47

In its District of Columbia income tax return which they filed on behalf of the estate for the year ended December 31, 1960, petitioners reported $32,764.47 as income derived from dividends by virtue of the liquidating distribution (J.A. 5, 11). This amount represented the corporation's earned surplus to the extent of the difference between the total net distribution of $689,836.47, and $657,072.00, the fair market value of the company's stock as of February 22, 1958 (the date of Mr. Uline's death)

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[2] It was stipulated by the parties below that the fair market value of these notes on May 3, 1960, was the balance due on the notes on that date.

as finally determined for federal estate tax purposes (J.A. 11, 38).[3]

The District of Columbia taxing authorities assessed a deficiency of income tax against the estate based upon their determination that instead of the $32,764.47 figure reported as the income received from the liquidating distributions, the correct amount was $588,355.82 (J.A. 38). The latter figure reflects the full amount of the earned surplus of the M. J. Uline Company as of December 14, 1960 (J. A. 10, 38). Prior to adjustments to reflect the liquidating distributions of May 3, 1960, and December 14, 1960, the capital account and earned surplus account on the books of M. J. Uline Company as of December 14, 1960, the date of final liquidation, were as follows (J. A. 10):

Capital	$105,300.00
Earned Surplus	588,355.82
Total	$693,655.82

The difference between this total of $693,655.82 and the total net distribution of $689,836.47, as set forth above, is $3,819.35, which is attributable to the following (J. A. 11):

Liabilities of Corporation assumed by estate but not reflected on the books of the Corporation:

1959 and 1958 tax deficiencies of corporation	$3,894.73
Accounts payable - Clock repair	217.85
	$4,112.58

Less:

Assets distributed but not reflected as distribution on books of Corporation:

Cash - Riggs-Payroll Acct.	$ 247.66
Riggs-Regular Acct.	45.03
	292.69
	$3,819.89

Minus: Discrepancy in balance of Uline, Inc. notes	.54
	$3,819.35

[3] This was the highest valuation placed by the United States or by any authorized taxing state or territory upon the transfer of the stock to the estate.

The asserted deficiency which was upheld by the Tax Court was based upon the taxing authorities' determination that the gross income attributable to the estate from the liquidating distributions was the total amount distributed to the estate in the liquidation, less only $105,000, the amount originally paid into the corporation as capital by Migiel J. Uline (J. A. 35, 43).

STATUTES INVOLVED

The District of Columbia Income and Franchise Tax Act of 1947, as amended; 61 Stat. 328, Ch. 258 -- District of Columbia Code (1961 Ed.)

§ 47-1551 c. General Definitions.

For the purposes of this subchapter and wherever appearing herein, unless otherwise required by the context -

* * *

(m) The word "dividend" means any distribution made by a corporation (domestic or foreign) to its stockholders or members, out of its earnings, profits, or surplus (other than paid-in surplus), whenever earned by the corporation and whether made in cash or any other property (other than stock of the same class in the corporation if the recipient of such stock dividend has neither received nor exercised an option to receive such dividend in cash or in property other than stock instead of stock) and whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation: Provided, however, That in the case of any dividend which is distributed other than in cash or stock in the same class in the corporation and not exempted from tax under this subchapter, the basis of tax to the recipient thereof shall be the market value of such property at the time of such distribution: And provided, however, That

the word "dividend" shall not include any dividend paid by a mutual life insurance company to its shareholders.

§ 47-1557a. Gross income and exclusions therefrom.

(a) The words "gross income" include gains, profits, and income derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, including salaries, wages, and compensation paid by the United States to its officers and employees to the extent the same is not exempt under this subchapter, or income derived from any trade or business or sales or dealings in property, whether real or personal, other than capital assets as defined in this subchapter, growing out of the ownership, or sale of, or interest in, such property; also from rent, royalties, interest, dividends, securities, or transactions of any trade or business carried on for gain or profit, or gains or profits, and income derived from any source whatever.

(b) The words "gross income" shall not include the following:

* * *

(3) Gifts, bequests, and devises. - The value of property acquired by gift, devise, or inheritance (but the income from such property shall be included in gross income).

* * *

(11) Capital gains. - Gains from the sale or exchange of any capital assets as defined in this subchapter.

§ 47-1557b. Deductions.

(a) Deductions allowed. - The following deductions shall be allowed from gross income in computing net income:

* * *

(4) Losses. - Losses sustained during the taxable year and not compensated for by insurance or otherwise -

* * *

(B) if incurred in any transaction entered into for the production or collection of income subject to tax under this subchapter, or for the management, conservation, or maintenance of property held for the production of income subject to tax under this subchapter, though not connected with any trade or business;

(b) Deductions not allowed. - In computing net income, no deductions shall be allowed in any case for -

* * *

(6) Capital losses. - Losses from the sale or exchange of any capital asset as defined in this subchapter.

§ 47-1583. Basis for determining gain or loss.

The basis for determining the gain or loss from the sale, exchange, or other disposition of property shall be the cost of such property, except that -

* * *

(b) In respect of any real or tangible property acquired after December 31, 1938, the cost thereof shall be adjusted as follows:

* * *

(3) In the case of property (including intangible personal property) acquired by gift or inheritance, where the transfer thereof to the taxpayer was subject to tax by the United States or by any jurisdiction in which the property had a taxable situs at that time, the basis of the property so acquired shall be the highest valuation then placed upon such transfer by the United States or by any authorized taxing State or Territory thereof. If such transfer of the property was not subject to the aforesaid transfer tax, the base shall be the fair market value of such property at the time acquired. For the purpose of this subsection, the

time such inherited property was acquired shall be the date of death of the decedent. The basis herein provided for shall be subject to the appropriate adjustment or adjustments defined in subsection (b) of this section.

STATEMENT OF POINTS

1. The Tax Court erred in holding, purportedly in reliance upon Berliner v. District of Columbia, 103 U.S. App. D.C. 351, 258 F. 2d 651 (1958), that an estate's tax basis for stock which it acquired from decedent in a corporation which was subsequently liquidated and dissolved must be disregarded in determining the extent to which the estate derived gain, profit or income from the liquidating dividend.

2. If the estate was required to treat as income the entire corporate surplus of the liquidating corporation, even though part of this amount was a recoupment of the estate's basis for the cancelled stock, the Tax Court erred in refusing to allow the estate to offset against this income the amount by which its basis for the stock exceeded the non-dividend portion of the liquidating distribution.

SUMMARY OF ARGUMENT

I. This Court's Berliner decision was misconstrued by the court below as requiring the harsh result reached in this case. Correctly applied, Berliner supports our contention that only that portion of the aggregate distributions received by the estate which exceeded its basis for the stock which it surrendered in the dissolution was taxable as a dividend (includible in its gross income) to the extent of the corporation's accumulated earnings.

In Berliner, the taxpayers were original stockholders of the

corporation and the basis for the stock which they surrendered was the same as the amounts which they had originally paid into the corporation. Thus, the entire corporate surplus which they received in liquidation of the corporation was held includible in their gross income as dividends. It frequently happens, however, that basis of stock is substantially higher than paid-in capital of a corporation. This is particularly so when, as here, stock has been transferred by sale, bequest, or otherwise during the corporation's lifetime. This Court did not intend to include liquidating distributions in the income of the recipient to the full extent of the corporate surplus irrespective of the fact that the cost or other basis of the stock surrendered in the transaction may be much higher than the amount of paid-in capital.

Absurd consequences which flow from disregarding a recipient's basis are not required by the taxing statute or any judicial decision. Moreover, they conflict with fundamental concepts of income and realization of income. The statute is explicit that only gain, profit, or income derived from a dividend is includible in gross income. Where, as in the case at bar, the recipient's entire interest in the corporation is closed out in the same transaction by which it receives the distribution in liquidation, it is taxable on the proceeds only if it recoups its tax basis; in short, only to the extent that it derives a profit on its investment.

Clearly Congress did not intend to impose estate and inheritance taxes based upon the fair market value of stock which an estate acquires from a decedent - which then becomes its basis for the stock - and then subject the estate to ordinary income taxes on amounts received in return for giving up that interest. It frequently happens that an estate must liquidate a corporation, the stock of which it acquired from a decedent, in order to obtain the necessary funds with which to pay estate and inheritance taxes. By providing a "stepped-up" basis for property acquired

from a decedent, Congress assured taxpayers that no part of the value of the property would be included in gross income. The decision below has nullified that assurance.

II. The only way in which the holding below that the entire corporate surplus constitutes dividend income to the estate can be accomodated with Constitutional requirements, with Congressional intent and with fundamental fairness, is to permit the estate to offset against this gross income the loss which it incurred in the disposition of the stock. This method - which the Tax Court rejected sub silentio - is fully supported by decisions and regulations applying the Revenue Act of 1921, upon which the present District of Columbia provisions for taxing liquidating distributions were patterned. These precedents which, as this Court has stated, are particularly significant in construing the District of Columbia statute, have uniformly permitted the difference between the basis for the stock and the non-dividend portion of the distribution to be offset against the dividend income.

Either the method of allowing a loss deduction or the method of excluding from gross income the portion of amounts received in the liquidation which did not exceed the estate's basis for its stock carry the same ultimate consequence with respect to the tax effect of the liquidating distribution. That is, the tax computed and paid by the estate on the amounts which it received in the liquidation and dissolution of the corporation was correct under either method. The deficiency asserted has no sound legal basis, and the decision below should, therefore, be set aside.

ARGUMENT

I. Preliminary Statement

The issue in this case is whether Berliner v. District of Columbia [4]

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[4] 103 U.S. App. D.C. 351, 258 F. 2d 651 (1958), cert. den. 357 U.S. 937 (1958).

means, as the Tax Court held, that amounts received in complete liquidation of a corporation are taxable income to the stockholder-recipient as a dividend to the extent of the corporation's accumulated earnings without regard to the stockholder's cost or other basis for the stock; or, does it mean, as petitioners contend, that only that portion of the aggregate amounts received in the distribution which exceeds the cost or other basis of the stock is taxable as a dividend to the extent of the corporation's accumulated earnings.

The Tax Court misconceived the essential thrust of our position for it proceeded on the erroneous premise that:

> "What the petitioner is asking, or that upon which it is insisting, is the same tax treatment by the assessing authority of the District as is provided in the Internal Revenue Code in respect of amounts received from or in connection with the dissolution of a corporation; in other words, that the amount received in excess of the basis, original or adjusted or stepped-up, of the taxpayer's stock be considered capital gain." (J. A. 39)

The contention mistakenly attributed to us by the Tax Court was buried in Berliner, and we are not attempting to resurrect it. We fully appreciated that the receipt of a distribution in liquidation has different tax consequences under District of Columbia law than under the Internal Revenue Code.[5] The point at issue was not whether amounts received in the liquidating distribution constitute dividends as distinguished from proceeds of an exchange in a capital transaction, but rather whether the estate was entitled to recoup the basis for its stock before it was chargeable with having received dividend income to the extent of the corporate earnings. At no time did petitioners attempt to challenge the principle

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[5] As the Court in Berliner noted, the Revenue Acts of 1918 and 1924, as well as all subsequent acts, including the present Internal Revenue Code, provide that amounts distributed in complete liquidation shall be treated as in full payment in exchange for the stock. This was not the case under the Revenue Acts of 1916, 1917 and 1921, upon which Congress patterned the District of Columbia's taxing statute with respect to the treatment of liquidating distributions.

that, upon recovery of the basis, the excess (i.e., the aggregate amount received in the distribution less the estate's basis for that stock) was taxable income as a dividend and not a non-taxable capital gain.[6]

The precise question in the Berliner case, which was articulated at the outset of the opinion, was "Whether amounts distributed in complete liquidation of a corporation, to the extent that those amounts exceed the cost of the stock and represent corporate earnings, are properly includible in the stockholders' gross income as a dividend under Section 47-1551c(m) of the District of Columbia Code (1951)."[7] The taxpayers were allowed in Berliner to recoup the cost of their stock and the Court was concerned only with the proper classification of the excess amount received in the distribution. It determined that the excess was taxable dividend income and not, as petitioners in that case contended, non-taxable proceeds of the exchange of a capital asset.

Since the shareholders in the Berliner case had acquired their interests at the inception of the corporation and, therefore, the basis for the stock which they surrendered was equivalent to the paid-in capital of the corporation, the entire corporate surplus was held to be includible in the shareholders' gross income as dividends. The Court below applied this holding to the case at bar involving a different situation in which the basis of the stock was substantially higher than the paid-in capital of the corporation -- a situation, incidentally, which frequently, if not usually, obtains where stock has been transferred, by sale, bequest or otherwise,

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[6] In the income tax return which was filed by petitioners, the sum of $32,764.47 (representing the difference between the distributions in liquidation and the estate's basis for the stock) was specifically reported as ordinary, dividend income, subject to tax, and not as a capital gain. (J.A. 33)

[7] 103 U.S. App. D.C. at p. 352; 258 F. 2d at p. 652 (Emphasis added). As Judge Danaher pointed out in his dissenting opinion (on a ground not pertinent here): "I am confident my colleagues will not wish to be understood as saying that a 'dividend,' as they define it, will result in taxability as though upon income if a stockholder takes a loss when a corporation upon liquidation returns less than his invested capital." 103 U.S. App. D.C. at p. 359, n. 9; 258 F. 2d at p. 659, n. 9.

during a corporation's lifetime — and held that the recipient of the liquidating distribution received ordinary income to the full extent of the corporation's earned surplus.

We submit that in applying Berliner woodenly to a significantly different factual situation, the Tax Court reached an unsound result. Our position is two-pronged: A. The statute does not purport to tax dividends per se but only income, gain or profits derived from dividends; thus, a shareholder who received a distribution in liquidation and dissolution is not chargeable with income until he recoups the basis of the stock which is cancelled in the transaction. B. If, as the Tax Court held, the entire amount of the distribution is includible in the estate's gross income to the full extent of the corporation's accumulated earnings, regardless of the estate's basis for its cancelled stock, it was entitled to offset against this amount the loss which it sustained in the disposition of the stock.

II A Stockholder Who Receives a Distribution in Liquidation and Dissolution of a Corporation Is Entitled To Recover the Cost or Other Basis of His Stock before Being Subjected To Income Tax; Only the Excess over the Basis Is Taxable Income to the Extent of the Accumulated Earnings of the Corporation.

The result reached by the Tax Court contravenes Congressional intent as expressed in the District of Columbia taxing statute and is at variance with fundamental concepts relating to realization of income. Concededly, Section 47-1551c(m) of the District of Columbia Code (1961 Ed.) which defines "dividend" as including any distribution out of corporate earnings "whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation" is sufficiently comprehensive to embrace a liquidating dividend as well as a dividend declared and paid by a going business. It does not, however, delineate the portion of the dividend so defined which is includible in gross income. The governing provision on

that point is Section 47-1557a(a) which states that "gains, profits and income derived from" dividends and other specified and unspecified sources are includible in gross income. In short, the taxability vel non of a liquidating distribution is not resolved merely by ascertaining that the distribution represents corporate earnings and hence is a dividend; it is necessary to go further and determine whether, in view of the recipient's basis for the stock which was cancelled in liquidation and dissolution, he derived gains, profit or income by receipt of the liquidating "dividend."

In the case of an ordinary dividend paid by a going business, the shareholder continues to maintain his proportionate interest in the corporation and receives something in addition to that interest by way of the dividend. Whether or not the value of his interest will ultimately be affected by the corporation's distribution of corporate earnings in the form of a dividend is conjectural at the time the dividend is received. Stated differently, the impact which the dividend has upon his interest in the corporation will not be fully realized by him until he disposes of his stock. Under these circumstances, it has been deemed fair, consistently with our annual system of accounting for tax purposes, to treat the dividend as income when received and to defer recognition of the tax impact of the dividend upon his investment until such time as the shareholder effectuates a closed transaction involving his investment.

In contrast, a dividend paid to a shareholder in complete liquidation and dissolution involves an immediate quid pro quo on the part of the recipient. The latter's entire interest in the corporation is surrendered in a closed transaction. There is thus a taxable event — a closed transaction — so that the amounts received by the taxpayer in liquidation can be placed in juxtaposition with the basis for the stock which he surrenders in the dissolution of the corporation. To the extent that the amounts

received exceed the basis for the stock, gain is recognized, of course, and under the District of Columbia statute, that gain is treated — not as a gain from the exchange of stock, as under Federal law — but as ordinary income to the extent of the accumulated earnings of the corporation. In reporting as $32,764.47 the amount of dividends includible in the estate's gross income, petitioners followed this procedure precisely. We submit that they acted fully in accord with both reason and authority.

The District of Columbia taxing statute did not undertake to convert what is not income into income. Substance must be ascribed to the words "gains, profits and income derived from" in Section 47-1557a(a) and the meaning of income is " . . . to be gathered from the implicit assumptions of its use in common speech."[8]

The Berliner opinion was written by Judge Washington. In his recent opinion in District of Columbia v. Goldman, No. 17,352, decided December 26, 1963 (in which he dissented on a point not pertinent here), he stated that " . . . after the stockholder's investment in the corporation has been returned to him tax free, the profits on his investment are taxable as thereafter received, whether or not they be 'dividends.'"[9] Conversely, we submit, unless the taxpayer has derived a profit on his investment he should not be taxed on the liquidating distribution. For, as Judge Washington pointed out, "Were it not income Congress would be powerless to treat it as gain subject to income tax under the Sixteenth Amendment."[10]

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[8] Judge Learned Hand in United States v. Oregon-Washington R. & Nav. Co., 251 Fed. 211, 212 (2d Cir. 1918). This precept is also apparent from the Supreme Court's decision in Commissioner of Internal Revenue v. Wilcox, 327 U.S. 404, 407 (1946) in which it stated that "the very essence of taxable income, as that concept is used in Section 22(a) [of the Internal Revenue Code of 1939, the equivalent of Section 47-1557a(a) of the District of Columbia Code, defining gross income] is the accrual of some gain, profit or benefit to the taxpayer." Cf. Goodrich v. Edwards, 255 U.S. 527 (1921); Walsh v. Brewster, 255 U.S. 536 (1921).

[9] Slip opinion, p. 9.

[10] Slip opinion, p. 10, n. 5.

It may be added that the taxation of the proceeds of a liquidation to a shareholder who has derived no gain or profit from the distribution is also outside of the bounds of due process and hence violative of the Fifth Amendment.[11] Constitutional limitations were obviated in Berliner by the fact that the proceeds of the liquidation which were taxed as dividends were clearly gain or profit to the recipients in their entirety. As this Court stated, 103 U.S. App. D.C. 351, 355, 258 F. 2d 651, 655 (1958):

> "In respect of the taxpayers here the [Constitutional] argument overlooks the fact that the distributions not only returned to them their capital investments in full but also a substantial additional amount as a gain or profit. The question is whether the Fifth Amendment permits Congress to tax this profit as dividend income, when it also represented a distribution of corporate earnings. The courts have frequently recognized that a distribution of earnings in liquidation may rationally be treated as a dividend as well as an exchange. It was constitutionally open to Congress to elect to tax the profit as a dividend for purposes of the District tax, . . . " [Emphasis added].

The position of the court below is that the taxing authorities need look only to the classification of the distribution in a corporation's hands (to determine whether or not it was out of earnings) and may disregard the stockholder's basis.[12] This is in contrast to the view of Judge Washington in the Goldman case, supra, in which he stated:

> "[T]he nature or classification in the corporation's hands of the amounts distributed is irrelevant for our purposes. We are required to determine their proper nature or classification from the stockholder's standpoint, once he has received them." [13]

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[11] The Fifth Amendment to the United States Constitution applies, of course, to Congress in legislating for the District of Columbia. Wight v. Davidson, 181 U.S. 371, 21 Sup. Ct. 616 (1901).

[12] Cf. Dinkin v. District of Columbia, D.C. Tax Court, decided July 7, 1961, CCH D.C. Tax Service, par. 200-002.

[13] Slip opinion, p. 9.

The unconscionable results which would follow adoption of the Tax Court's view may be illustrated by the following example:

> A, the sole stockholder of a corporation which has a paid-in capital of $5,000 and an earned surplus of $15,000 — which are reflected in assets worth $20,000 — sells his stock to B for $20,000. In subsequent years, the assets decline in value and are sold by B for $15,000 in cash, which is then distributed in liquidation to B. Under the Tax Court's construction, B would have to pay a tax on $15,000 of dividend income even though the total amounts which he received from the corporation were $5,000 less than his investment in the corporation's stock.

The absurd result which flows from disregarding the stockholder in determining whether he has derived income from a liquidating dividend is reached only by failing to heed the Supreme Court's admonition in United States v. Kirby, 74 U.S. 482, 486 (1869) that "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence." This principle guided the court in Hyman v. District of Columbia, 101 U.S. App. D.C. 179, 181, 247 F. 2d 585, 587 (1957).

The basis which the estate was entitled to recoup was the fair market value of the stock at the time of the decedent's death. Section 47-1583(b)(3) of the District of Columbia Code (1961 Ed.) provides that:

> "In the case of property (including intangible personal property) acquired by gift or inheritance, where the transfer thereof ,to the taxpayer was subject to tax by the United States or by any jurisdiction in which the property had a taxable situs at that time, the basis of the property so acquired shall be the highest valuation then placed upon such transfer by the United States or by any authorized taxing state or territory thereof."

The Tax Court regarded the basis provision as irrelevant in that it relates to the "sale, exchange or other disposition" of assets and, according to the Tax Court, Berliner holds that none of these transactions occur when a corporation is dissolved and its assets distributed to the stockholders. This, we submit, is an unwarranted extension of Berliner. While Berliner stated that the proceeds of a distribution in liquidation are not to be treated the same as proceeds from a sale or exchange of a capital asset, at no point did it purport to negative the obvious fact that there was a disposition of the stock when it was surrendered for cancellation.

In summary, the fair market value of the decedent's stock at his death — which was actually the amount upon which the estate paid inheritance and estate taxes — constituted the estate's basis for the stock, not only for the purpose of determining the amount of capital gain in situations where capital gain treatment is proper, but also for the purpose of determining the amount of ordinary income when the transaction results in ordinary income, as in the instant case.

The unsoundness of the Tax Court's decision is apparent also from a consideration of Section 47-1557a(b)(3), District of Columbia Code (1961 Ed.) which provides:

> (b) The words "gross income" shall not include the following:
>
> * * *
>
> (3) Gifts, bequests, and devises - The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income).

In Hatch v. Commissioner of Internal Revenue, 190 F. 2d 254, 256 (2d Cir. 1951), the taxpayer acquired as widow and sole legatee of her deceased husband, a contract obligation of a corporation to pay the decedent's estate

$30,000 per year for 10 years from date of death. For Federal estate tax purposes, the contract was valued at $243,326.70, as of the date of the decedent's death. Although holding that any payments received by the taxpayer in excess of the estate tax valuation constituted income to her, the court recognized that the value of the bequest was excluded from income taxation by Section 22(b)(3) of the Internal Revenue Code of 1939, the equivalent of Section 47-1557a(b)(3) of the District of Columbia Code, supra. The "value" of the property which is excluded from gross income by Section 47-1557a(b)(3) is equal to its basis determined under Section 47-1583(b)(3). In the Hatch case, the sections of the Internal Revenue Code of 1939 which were involved were almost identical to the pertinent sections of the District Code. No sound reason is apparent why Congress should have intended the result to be different under the District statute from the result under the Federal statute at a time when the provisions of each were almost identical to one another.

The Hatch decision follows Burnet v. Logan, 283 U.S. 404 (1931). In that case, the taxpayer's mother had sold her stock in Andrews & Hitchcock Iron Company to Youngstown Sheet & Tube Company in consideration of annual payments based upon annual extraction of iron ore from mines owned by Andrews. Upon her mother's death, the taxpayer acquired one-half of her mother's right to receive the annual payments. The value of the taxpayer's interest so acquired was $277,000 at the time of her mother's death. The Supreme Court held that no part of the annual payments received by the taxpayer was includible in her income until the amount received exceeded $277,000. As the Court stated, supra, at p. 414:

> "If a sum equal to the value thus ascertained had been invested in an annuity contract, payments thereunder would have been free from income tax until the owner had recouped his capital investment. We think a like rule should be applied here. The statute [providing that the value of property acquired from a decedent

> was to be excluded from gross income and exempt from income tax] definitely excepts bequests from receipts which go to make up taxable income."

Section 47-1557a(b)(3), supra, explicitly states that the value of property acquired from a decedent shall be excluded from gross income. If the estate is required to include all amounts received in the liquidation of the corporation in its gross income without regard to the value (i.e., basis) of the stock acquired from the decedent, such value will in practical effect often be subjected to income taxes, notwithstanding the provisions of the statute. It is commonplace for estates to find themselves in a position where, in order to have funds with which to pay estate and inheritance taxes, they have to liquidate corporations, the stock of which has been acquired from the decedent. Congress did not intend the value of such property to be taxed as income when it was also subjected to estate and inheritance taxes. By providing a "stepped-up basis" for property acquired from a decedent, Congress assured taxpayers that no part of the value of the property transferred by death and subject to inheritance and estate taxes would be included in gross income.

III The Estate Was Entitled To Offset the Loss Which It Sustained on the Disposition of Its Stock.

Up to this point, our approach has been that only the portion of the liquidating dividend which exceeded the estate's basis for its stock was includible in its gross income. If, however, the liquidating distribution to the full extent of the corporation's earnings was includible in gross income, as the Tax Court held, the balance of the distribution, which represented a return of capital, was considerably less than the estate's basis for the stock. Thus, a loss was incurred in the disposition of the stock and, we submit, the estate was entitled to apply that loss to offset dividend income to the extent of the loss. As the Court in Commissioner

of Internal Revenue v. Sansome, 60 F. 2d 931, 932 (2d Cir. 1932) pointed out: the taxpayer "gets his quid pro quo in the closing transaction . . . the dice are not loaded against him."

This Court noted in Berliner that decisions under the Revenue Act of 1921, upon which the present District of Columbia Code provisions for taxing liquidating distributions were patterned, are particularly significant in interpreting the District of Columbia statute. The 1921 Act has uniformly been construed as permitting the difference between the basis for the stock and the non-dividend portion of the distribution to be offset against the dividend income. It has been recognized, under the 1921 Act, that the taxpayer may realize both a taxable gain and a deductible loss on the liquidating distribution if he surrenders his stock in the same year as he receives the dividend.

Hamilton Woolen Co., 21 B.T.A. 334 (1930) is a typical case in point. It held that, to the extent that the cost of the stock to the distributee (not an original stockholder) exceeded the balance of the distribution, he was entitled to a loss deduction. This principle was applied in McCaughn v. McCahan, 39 F. 2d 3, 4 (3d Cir. 1930); Eric A. Pearson, 16 B.T.A. 1405 (1929). In none of the cases involving an application of the 1921 Act was the taxpayer required to include the entire amount of the liquidating dividend in his income except where the aggregate amounts distributed in liquidation exceeded the basis of the recipient's stock by at least the amount of the dividend. See, e.g., Frank Darrow, 8 B.T.A. 276 (1927). Alternatively, a loss deduction was allowed to the extent of the difference between the basis and the non-dividend portion of the distribution.

The decisions under the 1921 Act were in line with the conclusion reached by the Treasury Department under that Act, to wit:

> "Article 1545. Distributions in Liquidation - Where a corporation distributes all of its property in complete liquidation or dissolution, the gain realized by the stockholder from

> the transaction, computed under Sec. 202 is taxable as a dividend to the extent that it is paid out of earnings or profits of the corporation accumulated since February 28, 1913. If the amount received by the stockholder in liquidation is less than the cost or other basis of the stock, a deductible loss is sustained." [14]

In permitting a loss to be taken, the Treasury, unlike the Court below in the present case, reached a result which is not unfair to the taxpayer. Magill, The Income Tax Liability of Dividends in Liquidation, 23 Mich. L. Rev. 565 (1925).

Although we urged in the court below that the estate was entitled to an offsetting loss, the findings of fact and the opinion are completely silent on the point. The Court ignored Section 47-1557b(a)(4)(B) of the Code which provides for the deduction from gross income of all losses sustained during the taxable year "if incurred in any transaction entered into for the production or collection of income subject to tax under this chapter [the current Income and Franchise Tax Law]." Since a liquidating dividend is subject to tax as income, losses sustained in the transaction by which that income was produced or collected are, by the very terms of the statute, deductible from gross income.

The prohibition in Section 47-1557b(b)(6) against deducting "losses from the sale or exchange of any capital asset" is inapplicable for, as Berliner held, no sale or exchange was involved in the estate's receipt of the liquidating distribution. Congress did not equip the taxing authorities with "loaded dice" so they could charge the estate with income on the theory that there was no sale or exchange and then disallow a loss on the theory that there was a sale or exchange. In disallowing losses on the sale or exchange of capital assets, Congress merely legislated a reciprocal provision to the non-recognition of capital gain under District of Columbia

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[14] Article 1545 of Regulations 62 (1922 Ed.) Relating to the Income Tax under the Revenue Act of 1921, published as Treasury Decision No. 3295 (Emphasis added).

law. (Section 47-1557a(b)(11)). While it may well be fair, both to taxpayer and the fisc, to disallow capital losses if capital gains are excluded from income, it is an injustice and a hardship to require the estate to include the liquidating dividends in its gross income to the full extent of the corporate surplus while at the same time disallowing the loss which it incurred in the transaction. The taxing statute does not countenance this kind of "heads I win, tails you lose" game.

The losses sustained by the estate in this case amounted to the difference between its basis for the stock ($657,072.00) and the non-dividend portion of the distribution ($101,480.65). The latter amount was derived by subtracting the dividend income of $588,355.82, as assessed by the taxing authorities, from the total distribution of $689,836.47. Thus, if the liquidating distribution constituted income to the estate to the full extent of the corporate surplus, the balance of the distribution, which is a return of basis, is the subtrahend used in computing deductible loss. As stated above, this procedure was following in Pearson, McCaughn and and other cases under the Revenue Act of 1921 cited above.

> "Until the Revenue Act of 1924, with the exception of the Revenue Act of 1918, liquidating distributions were not accorded separate treatment, with the result that distributions even though in partial or complete liquidation were taxable to stockholders as dividends, exempt from normal tax to the extent of the earnings and profits accumulated since February 28, 1913, any excess being applied against the basis of the stock in determining gain or loss from the liquidation." [15]

By allowing the loss of $555,591.35 which the estate sustained in the disposition of its stock to be offset against the $588,355.82 which the taxing authorities have asserted is dividend income, the result is the same as it would be if the estate were allowed to exclude from its gross income

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15 Darrell, Corporate Liquidations and the Federal Income Tax, 89 U. Pa. L. Rev. 907, 908 (1941). [Emphasis added].

all amounts received in the liquidation of the corporation which did not exceed its basis for the stock. Thus, the sum of $32,764.47 which was reported by the estate as net income from dividends was correct and the deficiency was improperly imposed and collected.

CONCLUSION

For the foregoing reasons, the decision of the Tax Court should be reversed and the case remanded for computation of the amount of refund to which the estate is entitled on the issue involved in this appeal.

Respectfully submitted,

HAROLD DAVID COHEN

Pierson, Ball & Dowd
1000 Ring Building
Washington, D.C. 20036

Attorney for Petitioners

Of Counsel:

ROBERT B. YORTY
JOHN R. SCHMERTZ, JR.
1000 Ring Building
Washington, D. C. 20036

January 23, 1964

INDEX

JOINT APPENDIX

DISTRICT OF COLUMBIA TAX COURT

ULINE, ESTATE OF MIGIEL JOHN, deceased, M. ULINE PRATT, and ELIZABETH R. STINE, Executrices,	)	Counsel: Robert B. Yorty, Esq. Robert B. Hankins, Esq. Pierson, Ball & Dowd
Petitioners,	)	
vs.	)	Address: 1000 Ring Building Washington 6, D. C.
DISTRICT OF COLUMBIA,	)	
Respondent.	)	Docket No. 1871

DOCKET ENTRIES

Date	Proceedings
1963	
April 11	Petition filed, Taxpayer, Corporation Counsel and Finance Officer served. Income Tax $31,805.03; Interest $3,339.53.
May 2	Hearing set for May 20--Certificate of service.
May 15	Motion for continuance--Granted to June 11--Certificate of service.
June 6	Motion for continuance.
June 7	Motion--Granted--hearing continued to June 25. Certificate of service.
June 25	Hearing--Henry E. Wixon, Esq., for District
July 25	Motion for Extension of Time For Filing Petitioner's brief--Motion granted--Petitioner's brief due August 8--Respondent's brief due August 22--Certificate of service.
Aug. 8	Brief of Petitioner--Certificate of service. Motion to correct record--Granted.

Date	Proceedings
Aug. 22	Motion for Extension of Time within which to File Brief for Respondent--Granted--Certificate of service.
Sept. 19	Brief for Respondent--Certificate of service.
Sept. 30	Finginds of Fact, Opinion and Decision--Certificate of service.
Oct. 24	Petition for Review of a Decision of the District of Columbia Tax Court--Certificate of Service.
Nov. 13	Designation of Record--Certificate of service.

[Filed April 11, 1963]

PETITION

The above-named Petitioner appeals from an assessment of taxes against it, and avers as follows:

1. The Petitioner is an estate having its address at: c/o Pierson, Ball & Dowd, 1000 Ring Building, 1200 - 18th Street, N. W., Washington 6, D. C.

2. The tax in controversy is an income tax for the taxable year ended December 31, 1960, in the amount of thirty one thousand eight hundred five dollars and three cents ($31,805.03), plus interest in the amount of three thousand three hundred thirty nine dollars and fifty three cents ($3,339.53).

3. The notice of assessment (statement of taxes and interest due) was dated January 14, 1963, as will appear from the copy thereof attached hereto as Exhibit A. The tax was paid by the Petitioner on January 29, 1963. Attached hereto as Exhibit B is the notice of deficiency and attached audit report upon which the tax assessment was based.

4. The assessment of tax is based upon the following errors:

(a) The Finance Officer erred in his determination that an amount equal to the surplus of the M. J. Uline Company was includible in the gross income of Petitioner because of the

distribution to Petitioner, an estate owning all of its capital stock, of all of the assets of the M. J. Uline Company in complete liquidation of that corporation. The Petitioner properly included in its gross income as a dividend the amount by which the proceeds of distribution exceeded Petitioner's basis for its stock as determined under the provisions of Section 47-1583(b)(3) of the D. C. Code. Since this amount represents the only gain, profit or income derived by Petitioner from the distribution, the Finance Officer erred in including in income any amount in excess thereof.

(b) The Finance Officer erred in determining (1) that withdrawals made by the decedent, Migiel John Uline, from the M. J. Uline Company prior to his death constituted a debt of the decedent to the corporation, and (2) that there was a forgiveness of indebtedness of the decedent by the M. J. Uline Company in 1960, which resulted in income to Petitioner.

5. The facts upon which the Petitioner relies as the basis of this proceeding are as follows:

(a) Prior to his death on February 22, 1958, the decedent, Migiel John Uline, owned all of the outstanding capital stock of the M. J. Uline Company, except for directors' qualifying shares, and he was the president and a director of that corporation. On the date of his death, the decedent held 1,053 shares of the stock of the corporation. The fair market value of the stock on February 22, 1958, as finally determined for Federal estate tax purposes was $624 per share for a total value of $657,072, this being the highest valuation then placed upon such transfer by the United States or by any authorized taxing state or territory thereof.

(b) For a number of years prior to December, 1959, the M. J. Uline Company's principal business activities had been the manufacture and sale of ice at its ice plant at Third and M Streets, N. E., Washington, D. C., and the operation of its

arena business in the Uline Arena at the same location.

(c) On December 16, 1959, the M. J. Uline Company adopted a plan of complete liquidation. Pursuant to an agreement entered into that date, the M. J. Uline Company sold all of its tangible assets, relating to its two principal businesses, to Uline, Inc., a corporation organized by Mr. Harry Lynn for the purpose of acquiring these businesses.

(d) The sale of the assets of the M. J. Uline Company to Uline, Inc., was consummated on December 31, 1959. The principal assets involved were the arena business, the ice plant, and the land upon which these businesses were located. Also included were the machinery and equipment delivery equipment, office furniture, miscellaneous inventory items, and all other tangible personal property used by the corporation in its ice and arena businesses.

(e) The purchase price for the M. J. Uline Company assets was $725,000, of which $275,000 was paid in cash at closing and the balance of $450,000 was represented by the promissory notes of Uline, Inc., secured by a second deed of trust on the real estate involved in the purchase.

(f) On May 3, 1960, the M. J. Uline Company made a liquidating distribution to the Petitioner of $183,000 in cash and the notes of Uline, Inc., which had been received as part of the purchase price for the sale of its assets. The unpaid balance of these notes on that date was $445,130.86. Of the cash distributed on this date, $2,746.04 represented a real estate tax deposit which was required to be made by Uline, Inc., to the holder of the notes.

(g) On December 14, 1960, a final liquidating distribution was made by the M. J. Uline Company to Petitioner of cash, in the amount of $70,747.97 and certain other miscellaneous assets.

(h) The distributions by the M. J. Uline Company to Petitioner were made in consideration of the surrender of the 1,053 shares of stock of the corporation, held by Petitioner, for cancellation and the assumption by Petitioner of certain known and all contingent liabilities of the corporation.

(i) Assuming that the value of the Uline, Inc., notes was equal to their unpaid balance, the net value of the entire liquidating distribution to Petitioner was $689,836.47.

(j) Without regard to the liquidating distribution, the surplus account on the books of the corporation at the time of the final liquidating distribution discloses a balance of $588,355.82.

(k) Since the sale of assets by the corporation was pursuant to a plan of complete liquidation and, since such liquidation was accomplished within one year of the adoption of such plan, no gain was recognized by the corporation for Federal income tax purposes under Section 337 of the Internal Revenue Code of 1954.

(l) For Federal income tax purposes, Petitioner treated the amounts distributed to it in the liquidation of the corporation as being in full payment in exchange for the stock pursuant to Section 331 of the Internal Revenue Code of 1954. Subtracting its basis for the M. J. Uline Company stock of $657,072 from the net proceeds of the distribution of $689,836.47, Petitioner arrived at a gain on the liquidation in the amount of $32,764.47, which was reported as long-term capital gain on petitioner's 1960 Federal income tax return.

(m) In computing taxable income from the liquidating distribution for District of Columbia income tax purposes, Petitioner also subtracted its basis for the M. J. Uline Company stock of $657,072 from the net proceeds of the distribution of $689,836.47, thereby arriving at a gain or profit from the liquidating distribution in the amount of $32,764.47. This amount was reported on Petitioner's 1960 District of Columbia income tax return as income derived from dividends.

(n) The Finance Officer has erroneously determined that the amount of $555,591.82 should be added to Petitioner's income for 1960 as a liquidating dividend. This amount represents the surplus account on the books of the corporation less the $32,764.47, which had been previously reported by petitioner as a liquidating dividend. (See Exhibit B)[1]

* * * * *

WHEREFORE, the Petitioner prays that this Court determine that the deficiencies assessed against it for the year 1960 were erroneously assessed, that Petitioner is entitled to a refund of the deficiencies and interest thereon paid, and that judgment shall accordingly be entered in favor of Petitioner, with interest thereon as provided by law.

Respectfully submitted,

/s/ Robert B. Yorty

/s/ Robert B. Hankins

/s/ Jack Rephan

Pierson, Ball & Dowd
1000 Ring Building
Washington 6, D. C.
Attorneys for Petitioner

ESTATE OF MIGIEL JOHN ULINE, DECEASED
By:
/s/ M. Uline Pratt
Executrix

/s/ Elizabeth R. Stine
Executrix

c/o Pierson, Ball & Dowd
1000 Ring Building
Washington 6, D. C.

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[1] Paragraphs (o) through (z) of the Petition have been omitted since the claim set forth therein is not an issue in this appeal.

DISTRICT OF COLUMBIA TAX COURT

ESTATE OF MIGIEL JOHN ULINE, deceased, M. ULINE PRATT and ELIZABETH R. STINE, Executrices, Petitioner,	)	
vs.	)	Docket No. 1871
DISTRICT OF COLUMBIA, Respondent	)	

STIPULATION

It is hereby stipulated and agreed between the District of Columbia and the above-entitled taxpayer, by their respective undersigned attorneys, that the following facts shall, for the purpose of this proceeding only, be taken as true, provided, however, that this stipulation does not waive the right of either party to introduce other evidence not at variance with the facts herein stipulated, or to object to the introduction in evidence of any such facts on the grounds of irrelevancy or immateriality.

1. Mrs. M. Uline Pratt and Elizabeth R. Stine are the Executrices of the Estate of Migiel John Uline, deceased (hereinafter referred to as the Petitioner) having as an address: c/o Pierson, Ball & Dowd, 1000 Ring Building, 1200 - 18th Street, N. W., Washington 6, D. C.

2. The tax in controversy is an income tax for the taxable year ended December 31, 1960, in the amount of thirty one thousand eight hundred five dollars and three cents ($31,805.03), plus interest in the amount of three thousand three hundred thirty nine dollars and fifty three cents. ($3,339.53).

3. The notice of assessment (statement of taxes and interest due) was dated January 14, 1963, as will appear from the copy thereof attached hereto as Exhibit 1-A. The tax was paid by Petitioner on January 29, 1963. Attached hereto as Exhibit 2-B is the notice of deficiency and attached audit report upon which the tax assessment was based.

4. Prior to and as of the date of his death on February 22, 1958, the decedent, Migiel John Uline, owned all of the outstanding capital stock of the M. J. Uline Company, an Ohio corporation, consisting of 1053 shares, and he was the president and a director of that corporation. The fair market value of the 1053 shares of stock on February 22, 1958, as finally determined for Federal estate tax purposes was $624 per share for a total value of $657,072, this being the highest valuation then placed upon such transfer by the United States or by any authorized taxing state or territory thereof.

5. For a number of years prior to December, 1959, the M. J. Uline Company's principal business activities had been the manufacture and sale of ice at its ice plant at Third and M Streets, N. E., Washington, D. C., and the operation of its arena business in the Uline Arena at the same location.

6. On December 16, 1959, the M. J. Uline Company adopted a plan of complete liquidation. A copy of the minutes of a special meeting of the board of directors of the corporation, held on December 16, 1959, in which the plan of liquidation is set forth as adopted by resolution of the board of directors that date is attached hereto marked Exhibit 3-C, and a copy of the minutes of a special meeting of the stockholders, held the same date, at which the plan was adopted by the stockholders of the corporation, is attached hereto marked Exhibit 4-D. Pursuant to an agreement entered into that date, the M. J. Uline Company sold all of its tangible assets, relating to its two principal businesses, to Uline, Inc., a corporation organized by Mr. Harry Lynn for the purpose of acquiring these businesses.

7. The sale of the assets of the M. J. Uline Company to Uline, Inc., was consummated on December 31, 1959. The principal assets involved were the arena business, the ice plant, and the land upon which these businesses were located. Also included were the machinery and equipment,

delivery equipment, office furniture, miscellaneous inventory items, and all other tangible personal property used by the corporation in its ice and arena businesses. Attached hereto as Exhibit 5-E is a copy of the bill of sale.

8. The purchase price for the M. J. Uline Company assets was $725,000, of which $25,000 consisted of a deposit made on December 16, 1959, $250,000 was paid in cash at closing on December 31, 1959, and the balance of $450,000 was represented by three promissory notes of Uline, Inc., payable to the seller, the M. J. Uline Company, secured by a second deed of trust on the real estate involved in the purchase. Copies of the three notes are attached hereto as Exhibits 6-F (a), 6-F (b) and 6-F (c).

9. Pursuant to a resolution adopted by the board of directors at a meeting held on May 2, 1960, a copy of the minutes of which meeting is attached hereto as Exhibit 7-G, the M. J. Uline Company made a liquidating distribution to the Petitioner on May 3, 1960, of $183,000 in cash and all of the notes of Uline, Inc. which had been received as part of the purchase price for the sale of its assets. The unpaid balance of these notes on that date was $445,130.86. Of the cash distributed on this date, $2,746.04 represented a real estate tax deposit which was required to be made by Uline, Inc. to the holder of the notes, and which the holder was required to use to pay the real estate taxes on the property securing the notes.

10. Pursuant to a resolution adopted by the board of directors at a meeting held on December 14, 1960, a copy of the minutes of which meeting is attached hereto as Exhibit 8-H, a final liquidating distribution was made on the same date by the M. J. Uline Company to Petitioner of cash in the amount of $70,747.97 and certain other miscellaneous assets. Attached hereto as Exhibit 9-I is a copy of an "Assignment of

Assets and Assumption of Liabilities" executed by the corporation and Petitioner on that date.

11. At the time that the final liquidating distribution was made on December 14, 1960, Petitioner delivered the stock certificates representing the 1053 shares of stock of the M. J. Uline Company to the corporation, and these certificates were thereupon cancelled by the Secretary.

12. The net value of the entire liquidating distribution to Petitioner was $689,836.47 computed as follows:

May 3, 1960 distribution:			
Cash		$183,000.00	
Less Real Estate Tax Deposit		2,746.04	
Net cash distribution			$180,253.96
Balance due on notes of Uline, Inc.*			445,130.86
Net distribution of May 3, 1960			$625,384.82
December 14, 1960 distribution:			
Cash		$ 70,747.97	
By payment of Estate obligation to Ernst & Ernst		325.00	
Total distribution		$ 71,072.97	
Less Corporate Liabilities assumed by Estate:			
1960 Federal and D. C. Income and Franchise Taxes	$2,508.74		
1959 and 1958 Federal and D. C. Tax deficiencies	3,894.73		
Acct. Payable — clock repair	217.85		
		6,621.32	
Net distributions of December 14, 1960			$ 64,451.65
Total net distribution			$689,836.47

13. Prior to any adjustments to reflect the liquidating distributions of May 3, 1960, and December 14, 1960, the capital account and the earned surplus account on the books of the M. J. Uline Company as of December 14, 1960, the date of final liquidation, were as follows:

Capital	$105,300.00
Earned Surplus	588,355.82
Total	$693,655.82

*It is stipulated that the fair market value of these notes on May 3, 1960, was the balance due on the notes on that date.

The difference between this total of $693,655.82 and the total net distribution of $689,836.47 is $3,819.35, which is attributable to the following:

Liabilities of Corporation assumed by Estate but not reflected on books of corporation:		
1959 and 1958 tax deficiencies of corporation		$3,894.73
Acct. Payable — clock repair		217.85
		$4,112.58
Less: assets distributed but not reflected as distribution on books of corporation:		
Cash — Riggs — payroll account	$247.66	
Riggs — regular account	45.03	
		292.69
		$3,819.89
Minus: discrepancy in balance of Uline, Inc., notes		.54
		$3,819.35

14. In computing taxable income from the liquidating distribution for District of Columbia income tax purposes, Petitioner subtracted the February 22, 1958 fair market value of the M. J. Uline Company stock of $657,072 from the value of the distribution of $689,836.47. The difference of $32,764.47 was reported on Petitioner's 1960 District of Columbia income tax return as income derived from dividends. A copy of Petitioner's 1960 District of Columbia income tax return is attached hereto marked Exhibit 10-J.

15. The dissolution of M. J. Uline Company was completed on December 28, 1960, by the filing of Certificate of Dissolution with the Secretary of State of Ohio.

16. For a number of years prior to the death of M. J. Uline, the M. J. Uline Company maintained on its books an account in his name. Amounts due decedent as his salary as president of the corporation were credited to this account. Other amounts owed to the decedent, such as his expense allowance, were also credited to this account. Debited to this account were cash withdrawals for the decedent's personal use which were made either in the form of cash payments to him or by the payment

of his personal expenses by the corporation. At the time of his death, the debit balance of this account was $80,508.69.

Respectfully submitted,

Attorney for Petitioner

Attorney for Respondent

EXHIBIT 1-A

GOVERNMENT OF THE DISTRICT OF COLUMBIA
FINANCE OFFICE • Revenue Division

INCOME AND FRANCHISE TAX

TYPE TAX	ACCOUNT NUMBER	REF.	TYPE TAX	TAX YEAR	DATE	
I - Individual Income D - Declaration Payment N - Corporation J - Unincorporated Business F - Fiduciary E - Employer Withholding	3488317		F	1960	1/14/63	

NAME AND ADDRESS	TOTAL TAX DOLLARS	TOTAL TAX CTS.	CREDIT DOLLARS	CREDIT CTS.	INTEREST TO	PAYMENT DUE DOLLARS	PAYMENT DUE CTS.
Uline, Migiel J. (Estate) M.U. Pratt & E.A. Stine, Exect. C/O Pierson, Ball & Dowd 1200 18th St., N. W. Washington, D. C. 70,027.73	31,805.03+ IN 3,339.53+				JAN 15'63	35,144.56 *	

Interest on payment due at the rate of ½ of 1% per month or portion thereof must be added if not paid on or before the interest date shown on this bill. Late filing penalty is computed at 5% per month or portion thereof (maximum 25%), except type tax E which is a flat 25%.

Make check payable to D. C. TREASURER. Send check or money order to FINANCE OFFICE, REVENUE DIVISION, Municipal Center, Washington 1, D. C.

Your cancelled check is your receipt.

Interest at rate of ½ of 1% per month or portion thereof
from to

TOTAL PAYMENT DUE →

RETURN THIS NOTICE WITH PAYMENT

FFV 36 (5/60)

EXHIBIT 2-B

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of General Administration

* * *

May 21, 1962

M. U. Pratt and E. A. Stine, Executrices
For the Estate of Migiel John Uline
c/o Pierson, Ball & Dowd
Washington 6, D. C.

Re: No. 3488317(60)HWH

The examination by this office of your Fiduciary Income Tax return for the year ended December 31, 1960, indicates that the adjustment of your tax liability, as shown in the accompanying Report of D. C. Fiduciary Income Tax Audit Changes, is warranted.

IF YOU AGREE to the adjustment(s), as shown in the report, the enclosed form of waiver should be executed and forwarded to this office promptly. Action will then be taken as indicated on line 13 or 14 of the report, whichever is applicable.

IF YOU DO NOT AGREE to the adjustment(s), you may file a protest with this office, within thirty (30) days from the date of this letter, stating the grounds for your exceptions. Careful consideration will be given to such protest and, if you so request, an opportunity for a hearing in this office will be granted to you prior to final determination.

Should you fail to file either the enclosed waiver form or a written protest with this office within the thirty (30) day period, final determination of your tax liability will be made in accordance with the enclosed report.

Yours very truly,

/s/ Allison W. Shell
Supervisory Tax Auditor
Income and Franchise Tax Section

* * *

Finance Office
Revenue Division

GOVERNMENT OF THE DISTRICT OF COLUMBIA

REPORT OF D.C. FIDUCIARY INCOME TAX AUDIT CHANGES

Name and Address of Taxpayer(s)	Return Number	Date of Report
M.J. Scott + E.A. Ulm, Executors For the Estate of Miguel J. Ulm c/o Pierson, Ball + Dowd 1200-18th St. N.W. Washington 6, D.C.	3488317	5-15-62
	Year Ended 12-31-60	**Tax Auditor's** M. J. Kissinger A. W. Harris

1. Taxable income shown on return or as previously adjusted		$ 28,121.35
2. ADD: Additional income or unallowable deductions:		
A. Forgiveness of indebtedness	$ 80,508.69	
B. Liquidating dividend	555,591.82	
		636,100.51
3. Total of lines 1 and 2		$ 664,221.86
4. LESS: Decrease in income or additional deductions:		
	$	
5. Revised taxable income		$ 664,221.86
6. Revised tax liability		$ 32,836.09
7. LESS: Total tax shown on return or as previously adjusted		1,031.06
8. Deficiency in tax		$ 31,805.03
9. ADD: Penalty, if any		0
10. Total of lines 8 and 9		$ 31,805.03

Computation of Corrected Balance Due or of Net Overpayment

11. Revised tax liability and penalty, if any (total of lines 6 and 9)		$ 32,836.09
12. LESS: Total tax paid		
A. Tax withheld	$	
B. Payments on estimated tax		
C. With return	1,031.06	
D. Sum of items A through C	1,031.06	
E. Deduct previous refunds and/or credits		1,031.06
13. Balance due (Line 11 less line 12) Upon receipt of signed waiver, a bill will be mailed to you for this amount with interest thereon as provided by Law.		$ 31,805.03
14. Net overpayment (Line 12 less line 11) Upon receipt of signed waiver, a refund will be authorized for this amount		$

See other side for explanation of adjustments

Form FR-115 (4-61)

A. Forgiveness of indebtedness, per minutes of Board of Directors Special meeting of Dec. 14, 1960. It is assumed that this constitutes "gain income" as defined in Sec. 2 Title III of the Uniform and Franchise Tax Act of 1947, as amended.

B. Surplus, per books and records of the
M. J. Ulin Company $88,355.82
Less dividends omitted 32,764.47
Liquidating Dividend $55,591.82

THE WORD "DIVIDEND" AS DEFINED IN TITLE I, SECTION 4(m), DISTRICT OF COLUMBIA INCOME AND FRANCHISE TAX ACT OF 1547, AS AMENDED, INCLUDES THAT TYPE OF DISTRIBUTION KNOWN AS "LIQUIDATING DIVIDENDS" AND THE TAXABILITY THEREOF IS PROVIDED IN TITLE III, SECTION 2 OF THE ACT.

EXHIBIT 3-C

Minutes Of Special Meeting
Of The Board Of Directors
Of The M. J. Uline Company

A special meeting of the Board of Directors of the M. J. Uline Company was duly held at 11:00 A.M. in the offices of company, Washington, D. C., on Wednesday, December 16, 1959.

Present were: Mrs. Jean Paul Pratt, Mrs. Elizabeth R. Stine and Mr. Frederic J. Ball, consisting of all of the members of the Board of Directors of the company.

Mrs. Pratt was elected Chairman of the meeting and Mrs. Stine Secretary. After a full discussion of the present condition of the corporation, and upon motion duly made, seconded and carried, the following plan of complete liquidation and dissolution was unanimously adopted.

FIRST, that the corporation be completely liquidated and dissolved within one year from the date hereof.

SECOND, that to consummate such liquidation and dissolution, all of the fixed assets and business of the corporation be disposed of.

THIRD, that the proceeds of such disposition of the assets be used to pay off all of the liabilities of the corporation.

FOURTH, that after all of the foregoing has occurred and within one year from the date hereof, the remaining assets of the corporation be distributed to its stockholders in cancellation and redemption of their stock, provided however, that the Board of Directors shall have the right to retain such assets in the corporation as it deems necessary to cover unpaid and contingent liabilities of the corporation.

FIFTH, that the foregoing is subject to the approval of the stockholders, and the officers are hereby directed to call a special meeting of the stockholders to obtain such approval.

EXHIBIT 3-C (Cont'd.)

SIXTH, that in the event of approval of the stockholders, the officers be and they hereby are authorized to take such other action as is necessary to carry out the foregoing.

Upon motion duly made, seconded and carried, Mrs. Elizabeth R. Stine was elected as Assistant Secretary of the corporation.

Upon motion duly made, seconded and carried, it was resolved that, upon the approval of the stockholders of the corporation, the officers of the corporation be and they hereby are authorized to execute a contract with Harry Lynn for the purchase of all of the tangible assets of the corporation, a copy of said contract having been exhibited at the meeting and which is appended to these minutes.

There being no further business, the meeting was adjourned.

/s/ Mrs. Jean Paul Pratt

/s/ Mrs. Elizabeth R. Stine

/s/ Frederic J. Ball

Attachment

EXHIBIT 4-D

MINUTES OF SPECIAL MEETING OF THE STOCKHOLDERS OF THE M. J. ULINE COMPANY

A special meeting of the stockholders of the M. J. Uline Company was duly held at 11:30 a.m. in the offices of company, Washington, D. C., on Wednesday, December 16, 1959.

Present were: Mrs. Jean Paul Pratt and Mrs. Elizabeth R. Stine, executrices of the Estate of M. J. Uline, sole stockholder of the company.

Mrs. Pratt was elected Chairman and Mrs. Stine Secretary of the meeting.

Mrs. Pratt read the minutes of a Special Meeting of the Board of Directors of the M. J. Uline Company held at 11:00 a.m. at the offices of

EXHIBIT 4-D (Cont'd.)

the company on Wednesday, December 16, 1959, concerning the adoption of a plan of complete liquidation and dissolution of the corporation and a sale of all of the assets of the corporation pursuant to such plan.

Upon motion duly made, seconded and carried, it was RESOLVED:

> FIRST, that the plan of complete liquidation and dissolution of the corporation, subject to the approval of the Probate Court for the District of Columbia, be unanimously adopted.
>
> SECOND, that the contract with Harry Lynn for the sale of all of the tangible assets of the corporation, subject to the approval of the Probate Court for the District of Columbia, be and it hereby is approved.
>
> THIRD, that the officers and directors take such steps as may be necessary on behalf of the corporation to consummate the plan of liquidation and dissolution, including the execution of the contract with Harry Lynn, subject to the approval of the Probate Court for the District of Columbia.
>
> FOURTH, that the stockholders of the corporation proceed as expeditiously as possible to obtain approval of the plan of liquidation and the sale of the tangible assets by the Probate Court for the District of Columbia prior to the settlement under the contract with Mr. Lynn.

There being no further business, the meeting was adjourned.

ESTATE OF M. J. ULINE

By: /s/ M. Uline Pratt.

By: /s/ Elizabeth R. Stine

EXHIBIT 5-E

BILL OF SALE

KNOW ALL MEN BY THESE PRESENTS, that the M. J. Uline Company, for Ten Dollars ($10.00) and other good and valuable consideration, receipt of which is hereby acknowledged, does hereby grant, bargain, sell,

convey and transfer to Uline, Inc., all the machinery, equipment, office furniture and fixtures, trucks, tools, miscellaneous inventory, all customers' lists, telephone numbers, vending machines, and all tangible personal property of every nature and character located at 1132-1140, inclusive, Third Street, N. E., Washington, D. C., or at other places, and used in or connected with the business of the Uline Ice Company and the Uline Arena.

TO HAVE AND TO HOLD said property unto Uline, Inc., its successors and assigns, and for its and their use forever.

The M. J. Uline Company hereby warrants that it is the lawful owner of the property hereby granted, bargained, sold, conveyed and transferred, free and clear of all liens, charges and encumbrances, except for an existing judgment of Washington Sportservice, Inc., in the United States District Court for the District of Columbia in Civil Action No. 3317-55 amounting to Thirty-One Thousand Five Hundred ($31,500.00) Dollars; and that it has good and marketable title to such property except for such judgment and that it has the right to sell the same.

IN WITNESS WHEREOF, the M. J. Uline Company has caused this Bill of Sale to be executed by its duly authorized officers this 31st day of December, 1959.

ATTEST:

/s/ Frederic J. Ball

THE M. J. ULINE COMPANY

By /s/ M. Uline Pratt

EXHIBIT 6-F(a)

The Real Estate Title Insurance Company of the District of Columbia
AND
The Columbia Title Insurance Company of the District of Columbia

Office
1422 F Street, N. W.
Washington 4, D. C.

SECURED BY DEED OF TRUST

TO THOMAS J. GROOM and JOHN E. MONK TRUSTEES

CONVEYING Lots 8, 9, 10, 11, 42, 43, 802, 808, 809, 810, 811 and 812 in Square 748

Amount, - - - $ 300,000.00

Instalments, - - $ 2,305.56

Washington, D. C., December 31st, 1959

FOR VALUE RECEIVED, ULINE, INC.

promise to pay to THE M. J. ULINE COMPANY, an Ohio Corporation

or order, the principal sum of THREE HUNDRED THOUSAND _____ DOLLARS, with interest from the date hereof at the rate of ___ six _____ per centum per annum, on said principal sum or on so much thereof as may from time to time remain unpaid, said principal and interest being due and payable as follows:—in monthly instalments of TWO THOUSAND, THREE HUNDRED AND FIVE AND 56/100 _____ DOLLARS each, commencing on February 1st 1960, and continuing on the 1st day of each and every month thereafter up to and including December 1st 1972, each instalment when so paid to be applied first to the payment of interest accrued on the unpaid principal sum, and the residue thereof to be credited to said principal sum; and on the 31st day of December 1972, the entire amount of principal and interest then remaining unpaid shall be and become due and payable.

And it is expressly agreed that if default be made in the payment of any one of the aforesaid instalments when and as the same shall become due and payable, then and in that event the unpaid balance of the aforesaid principal sum shall, at the option of the holder hereof, at once become and be due and payable, anything hereinabove contained to the contrary notwithstanding.

Principal and interest payable at the office of the Bank of Commerce, Washington, D. C.

The privilege is hereby reserved of making payments on account of the principal sum of this note as provided in the Deed of Trust securing payment of this note.

ULINE, INC.

BY: .....
President

ATTEST:

.....
Secretary

No. 1 of 3

☞ Retain this note after payment that the Trustees may be satisfied as to its cancellation when a release is desired.

EXHIBIT 6-F(b)

The Real Estate Title Insura.. Company of the District of Columbia
AND
The Columbia Title Insurance Company of the District of Columbia
SECURED BY DEED OF TRUST

Office
1422 F Street, N. W.
Washington 4, D. C.

TO THOMAS J. GROOM and JOHN E. MONK TRUSTEES
CONVEYING Lots 8, 9, 10, 11, 42, 43, 802, 808, 809, 810, 811 and 812 in Square 748

Amount, - - - $127,500.00
Instalments, - - $ 979.85

Washington, D. C., December 31st, 19 59

FOR VALUE RECEIVED, ULINE, INC.

promise to pay to THE M. J. ULINE COMPANY, an Ohio Corporation

or order, the principal sum of ONE HUNDRED TWENTY-SEVEN THOUSAND, FIVE HUNDRED DOLLARS, with interest from the date hereof at the rate of six per centum per annum, on said principal sum or on so much thereof as may from time to time remain unpaid, said principal and interest being due and payable as follows:—in monthly instalments of NINE HUNDRED SEVENTY-NINE AND 85/100 DOLLARS each, commencing on February 1st 1960, and continuing on the 1st day of each and every month thereafter up to and including December 1st 19 72 each instalment when so paid to be applied first to the payment of interest accrued on the unpaid principal sum, and the residue thereof to be credited to said principal sum; and on the 31st day of December 1972, the entire amount of principal and interest then remaining unpaid shall be and become due and payable.

And it is expressly agreed that if default be made in the payment of any one of the aforesaid instalments when and as the same shall become due and payable, then and in that event the unpaid balance of the aforesaid principal sum shall, at the option of the holder hereof, at once become and be due and payable, anything hereinabove contained to the contrary notwithstanding.

Principal and interest payable at the office of the Bank of Commerce, Washington, D. C.

The privilege is hereby reserved of making payments on account of the principal sum of this note as provided in the Deed of Trust securing payment of this note.

ULINE, INC.

ATTEST:

BY: .....
President

.....
Secretary

No. 2 of 3

☞ Retain this note after payment that the Trustees may be satisfied as to its cancellation when a release is desired.

EXHIBIT 6-F(c)

The Real Estate Title Insurance Company of the District of Columbia
AND
The Columbia Title Insurance Company of the District of Columbia

22

Office
1422 F Street, N. W.
Washington 4, D. C.

SECURED BY DEED OF TRUST

TO THOMAS J. GROOM and JOHN E. MONK TRUSTEES

CONVEYING Lots 8, 9, 10, 11, 42, 43, 802, 808, 809, 810, 811 and 812 in Square 748

Amount, - - - $ 22,500.00

Instalments, - - $ 172.91

Washington, D. C., December 31st, 1959

FOR VALUE RECEIVED, ULINE, INC.

promise to pay to THE M. J. ULINE COMPANY, an Ohio Corporation

or order, the principal sum of TWENTY-TWO THOUSAND, FIVE HUNDRED DOLLARS, with interest from the date hereof at the rate of six per centum per annum, on said principal sum or on so much thereof as may from time to time remain unpaid, said principal and interest being due and payable as follows:—in monthly instalments of ONE HUNDRED SEVENTY-TWO AND 91/100 DOLLARS each, commencing on February 1st 1960, and continuing on the 1st day of each and every month thereafter up to and including December 1st 1972, each instalment when so paid to be applied first to the payment of interest accrued on the unpaid principal sum, and the residue thereof to be credited to said principal sum; and on the 31st day of December 1972, the entire amount of principal and interest then remaining unpaid shall be and become due and payable.

And it is expressly agreed that if default be made in the payment of any one of the aforesaid instalments when and as the same shall become due and payable, then and in that event the unpaid balance of the aforesaid principal sum shall, at the option of the holder hereof, at once become and be due and payable, anything hereinabove contained to the contrary notwithstanding.

Principal and interest payable at the office of the Bank of Commerce, Washington, D. C.

The privilege is hereby reserved of making payments on account of the principal sum of this note as provided in the Deed of Trust securing payment of this note.

ULINE, INC.

BY: .....
President

ATTEST:

.....
Secretary

No. 3 of 3

Mr. Groom this note after payment that the Trustees may be satisfied as to its cancellation when a release is desired.

EXHIBIT 7-G

THE M. J. ULINE COMPANY

MINUTES OF SPECIAL MEETING
OF THE BOARD OF DIRECTORS

A special meeting of the Board of Directors of The M. J. Uline Company was held at 1007 Ring Building, Washington 6, D. C., on May 2, 1960, at 2 P.M.

Present were:

Mrs. Jean Paul Pratt
Mrs. Elizabeth R. Stine
Frederic J. Ball

being all of the directors.

Mrs. Pratt was elected chairman of the meeting and Frederic J. Ball acted as secretary. The secretary presented and read a Waiver of Notice of the meeting signed by all of the directors.

The chairman stated that the corporation was continuing to pay off its liabilities in preparation for final liquidation. The chairman made reference to the Plan of Complete Liquidation and Dissolution which was adopted at the special meeting of the board of directors held on December 16, 1959, and approved by the stockholder's meeting held on the same date. The chairman noted that the fourth paragraph of the Plan of Complete Liquidation and Dissolution provided that the assets of the corporation should be distributed to its stockholders in cancellation and redemption of their stock, and that the board of directors should have the right to retain such assets as it deemed necessary to cover unpaid and contingent liabilities of the corporation. The board of directors thereupon discussed the financial condition of the corporation and the advisability of effecting a partial liquidation of its assets. The chairman stated that it would be desirable to make a partial liquidating distribution as soon as possible and in conformity with the Plan of Complete Liquidation and Dissolution. Upon motion, duly made, seconded and unanimously carried, it was

EXHIBIT 7-G (Cont'd.)

RESOLVED, that the President and Vice President of the corporation be and they hereby are authorized and directed to effect a partial liquidating distribution of the assets of the corporation by transferring the amount of $183,000.00 to the stockholders of the corporation;

FURTHER RESOLVED, that, with reference to the three promissory notes made payable to the corporation by Uline, Inc., and held in the Bank of Commerce, the President of the corporation be and she hereby is authorized and directed to effect a distribution of said notes by endorsing and transferring them to Myrtle Uline Pratt and Elizabeth R. Stine, Executrices of the Estate of Migiel John Uline.

The chairman stated that the next order of business would be the matter of closing the corporation's checking account at the Riggs National Bank of Washington, D. C. After discussion, and upon motion duly made, seconded and unanimously carried, it was

RESOLVED, that the President and Vice President of the corporation be and they hereby are authorized and directed to close the checking account of the corporation at the Riggs National Bank of Washington, D. C., and to deposit the balance contained therein to the checking account of the M. J. Uline Company at the Bank of Commerce, Connecticut Avenue and K Street, N.W., Washington, D. C.

There being no other business to come before the meeting it was, on motion duly made, seconded and carried, adjourned.

/s/ Frederic J. Ball
Secretary

EXHIBIT 7-G (Cont'd.)

THE M. J. ULINE COMPANY

WAIVER OF NOTICE
OF
SPECIAL MEETING OF THE
BOARD OF DIRECTORS

We, the undersigned, being all of the directors of The M. J. Uline Company, an Ohio corporation, do hereby waive notice of a special meeting of the Board of Directors of said corporation to be held at 1007 Ring Building, Washington 6, D. C., on the 2nd day of May 1960, at the hour of 2 P.M. for the purposes of effecting a partial liquidating distribution of the assets of the corporation, closing the corporation's checking account at the Riggs National Bank of Washington, D. C., and for the transaction of such other corporate business as may properly come before the meeting.

Dated this 2nd day of May, 1960.

/s/ Elizabeth R. Stine

/s/ M. Uline Pratt

/s/ Frederic J. Ball

EXHIBIT 8-H

M. J. ULINE COMPANY

MINUTES OF SPECIAL MEETING
OF
BOARD OF DIRECTORS

A special meeting of the Board of Directors of the M. J. Uline Company was held at 3:00 P.M., at 1007 Ring Building, Washington, D. C., on Wednesday, December 14, 1960.

The following were present:

Mrs. M. Uline Pratt
Mrs. Elizabeth R. Stine
Frederic J. Ball

constituting all of the members of the Board of Directors of the corporation.

EXHIBIT 8-H (Cont'd.)

Mrs. Pratt was elected Chairman of the meeting and Mrs. Stine, Secretary.

The Secretary was instructed to place the executed waiver of notice of the meeting with the minutes thereof.

The Chairman opened the meeting by announcing to the Board that the tax controversy involving withdrawals from the corporation by M. J. Uline had been settled; she stated that the corporation had been advised that under the terms of the settlement, the $80,508.69 carried on its books as an account receivable from Migiel J. Uline would be viewed by the Internal Revenue Service as follows:

(1) For the years 1953-58 the amounts of excessive withdrawals by M. J. Uline would be treated as dividends paid to Mr. Uline in the year in which the withdrawals were made.

(2) For the prior years (1947-52) that of the excess withdrawals of $31,903.64, sums totalling the amount of $10,207.21 would be treated as loans from the corporation to Mr. Uline, and the balance as dividends to him during the respective years that the amounts were withdrawn. It had been determined that the loans would be treated as forgiven to the Estate of Migiel J. Uline in 1958.

The Chairman stated that under the circumstances it would be advisable for the corporation to withdraw the claim it had filed with the District of Columbia Probate Court against the Estate of Migiel J. Uline. She noted that it would also be necessary to make correcting entries in the corporation's books reflecting the tax settlement. Thereupon, on motion duly made, seconded and carried, it was

RESOLVED that the President of the corporation be, and she hereby is, authorized and directed to take such steps as may be necessary to withdraw the corporation's claim for $80.508.69,

filed with the District of Columbia Probate Court against the Estate of Migiel J. Uline, Deceased;

FURTHER RESOLVED, that the President of the Corporation be, and she hereby is, authorized and directed to instruct Ernst & Ernst, the auditors for the corporation, to make appropriate correcting entries in the corporation's books for the purpose of reflecting the terms of the tax settlement described above.

The Chairman announced that the next order of business would be the payment of current liabilities of the corporation. In this connection she explained that the only known liability currently due was a sum owed to Ernst & Ernst in the amount of $3,500.00. After discussion, and upon motion duly made, seconded and carried, it was

RESOLVED that the officers of the corporation be and they hereby are authorized and directed to pay the aforesaid amount owed to Er nst & Ernst.

Thereupon, the $3,500.00 owed to Ernst & Ernst was paid by the execution of the corporation's check in that amount.

The Chairman next brought before the meeting the matter of the corporation's claim against Washington Sportservice, Inc. She noted that the responsibility for settling this claim had been transferred to Uline, Inc., as a part of the Sales Contract that was executed on December 16, 1959. In this connection, the Chairman advised the Board that Uline, Inc. had requested the M. J. Uline Company to execute a general release in favor of Washington Sportservice, Inc. She explained that this release was required as a means of expediting the settlement negotiations. Thereupon, after discussion, it was

RESOLVED, that, for the settlement purposes described above, the Secretary of the corporation be and he hereby is

authorized and directed to execute a general release of the corporation's claim against Washington Sportservice, Inc., and to file the same in such courts as are deemed appropriate.

The next business to come before the meeting was the matter of completing the liquidation and dissolution of the corporation pursuant to the Plan of Complete Liquidation and Dissolution adopted by the Board of Directors and Shareholders on December 16, 1959. The Chairman referred to the Fourth Paragraph of the Plan of Complete Liquidation and Dissolution, and noted that, within one year of December 16, 1959, the remaining assets of the corporation were to be distributed to its stockholders in cancellation and redemption of their stock. The Chairman reminded the Board that partial liquidation and dissolution had been authorized on May 2, 1960; she stated that it would be appropriate for the Board at this time to complete the liquidation and dissolution of the corporation by authorizing and directing the officers of the corporation to execute the documents in the form attached hereto, thereby effecting the liquidation of the corporation's assets by assigning them to the Estate of Migiel J. Uline, the sole stockholder, and effecting the dissolution of the corporation by completing the instruments required by the State of Ohio for the dissolution of a domestic corporation. After discussion, and upon motion duly made, seconded and carried, it was

RESOLVED, that the officers of the corporation be and they hereby are authorized and directed to effect the liquidation and dissolution of the corporation by executing the following documents, in the form attached hereto:

(1) An Assignment of Assets and Assumption of Liabilities;

(2) An Individual Guarantee of Payment of Ohio State Insurance Fund Premiums.

(3) A Certificate of Dissolution by the Shareholders of the M. J. Uline Company, and

(4) An Affidavit relating to personal property taxes in the State of Ohio.

Thereupon, in the presence of the Board of Directors, the above-designated instruments were duly executed by the appropriate officers of the corporation. Pursuant to the Assignment of Assets and Assumption of Liabilities, all of the cash assets in the corporation were distributed to the sole stockholder by the execution of the following checks, all made payable to the Estate of Migiel J. Uline, Deceased:

(1) A check in the amount of $247.66 transferring the balance of the corporation's payroll account in the Riggs National Bank.

(2) A check in the amount of $45.03, transferring the balance of the corporation's checking account in the Riggs National Bank.

(3) A check in the amount of $70,455.28, transferring the balance of the corporation's checking account in the Bank of Commerce.

Also pursuant to the Assignment of Assets and Assumption of Liabilities, the certificates for 1,053 shares of stock in The M. J. Uline Company were submitted to the Secretary for cancellation. These certificates, representing all of the outstanding shares of the corporation were thereupon cancelled.

Upon motion duly made, seconded and carried, it was

RESOLVED, that the attorneys for the corporation be and they hereby are instructed to file the duly completed documents of dissolution with the appropriate corporation officials in the State of Ohio.

The Chairman stated that it would be advisable for the corporation to appoint one or more agents to execute corporation documents and generally act on its behalf in connection with matters that may arise after the dissolution of the corporation is completed. For this purpose, upon motion duly made, seconded and carried, it was

RESOLVED, that the President and Secretary of the corporation be and they hereby are authorized to execute corporation documents and generally act on its behalf in connection with any matters that may arise after the dissolution of the corporation.

There being no further business to come before the meeting, it was, upon motion duly made, seconded and carried, adjourned.

/s/ Frederic J. Ball
Secretary

THE M. J. ULINE COMPANY

WAIVER OF NOTICE
OF
SPECIAL MEETING OF THE
BOARD OF DIRECTORS

We, the undersigned, being all of the directors of The M. J. Uline Company, an Ohio corporation, do hereby waive notice of a special meeting of the Board of Directors of said corporation to be held at 1007 Ring Building, Washington 6, D. C., on the 14th day of December, 1960, at the hour of 3 P.M. for the purposes of determining the proper disposition of a claim of the corporation against the Estate of M. J. Uline, to take the necessary and appropriate action to effectuate the complete liquidation and dissolution of the corporation, and for the transaction of such other corporate business as may properly come before the meeting.

EXHIBIT 8-H (Cont'd.)

Dated this 14th day of December, 1960.

/s/ Elizabeth R. Stine

/s/ M. Uline Pratt

/s/ Frederic J. Ball

EXHIBIT 9-I

ASSIGNMENT OF ASSETS
AND
ASSUMPTION OF LIABILITIES

This Assignment and Assumption Agreement made and entered into this 14th day of December, 1960 by and between the M. J. Uline Company, an Ohio corporation, (hereinafter referred to as Uline) and the Estate of M. J. Uline, Deceased.

WITNESSETH:

WHEREAS, M. Uline Pratt and Elizabeth R. Stine are the Executrices of the Estate of M. J. Uline (hereinafter referred to as Executrices); and

WHEREAS, the Estate of M. J. Uline, Deceased, is the owner of all of the issued and outstanding stock of Uline; and

WHEREAS, the Board of Directors and Stockholders of Uline have adopted resolutions authorizing the complete liquidation and dissolution of Uline by transferring all of the assets and liabilities of Uline to the Estate of M. J. Uline in cancellation and redemption of all of the issued and outstanding stock of Uline.

Now, therefore, in consideration of the mutual promises and covenants herein contained, the parties intending to be legally bound agree as follows:

EXHIBIT 9-I (Cont'd.)

ONE: Uline hereby transfers, assigns and delivers to Executrices on behalf of the Estate of M. J. Uline, all of the assets of Uline, whether tangible or intangible, including but not limited to cash on hand and in banks, accounts receivable and five (5) shares of the capital stock of the Arena Managers Association.

TWO: Executrices on behalf of the Estate of M. J. Uline hereby deliver to Uline certificates for One Thousand and Fifty-Three (1,053) shares of capital stock of Uline representing all of the issued and outstanding stock of Uline for cancellation by Uline.

THREE: Executrices on behalf of the Estate of M. J. Uline hereby assume and covenant to pay, so as to hold Uline completely harmless, all of the liabilities of Uline, whether such liabilities are vested, contingent or otherwise.

FOUR: The parties hereto will execute such other documents as may be necessary for the implementation or consummation of the Assignment and Assumption Agreement.

IN WITNESS WHEREOF, parties hereto have executed this Assignment and Assumption Agreement on the day and year first above written.

ATTEST:

/s/ Frederic J. Ball
Secretary

M. J. Uline Company

By /s/ M. Uline Pratt
President

Estate of M. J. Uline

By /s/ M. Uline Pratt
Executrix

By /s/ Elizabeth R. Stine
Executrix

EXHIBIT 10-J

FORM D-41
'ERNMENT OF
. DISTRICT OF
COLUMBIA

DISTRICT OF COLUMBIA
FIDUCIARY INCOME TAX RETURN
For Calendar Year 1960
(FOR ESTATES AND TRUSTS)

or fiscal year beginning ....., 19....., and ended ....., 19.....

Audited ..... 19..
By .....
Additional Information Requested .....
Deficiency Notice $.....
Refund Recommended $.....

To be filed with the Finance Officer, D. C., Municipal Center, 300 Indiana Ave., N. W., Washington 1, D. C., not later than the 15th day of the fourth month following the close of the taxable year.

Account No. .....

Print Name and Address Plainly

Name of Estate or Trust: Estate of Migiel John Uline

Name and Address of Fiduciary: Myrtle Uline Pratt and Elizabeth R. Stine, Executrices
c/o Pierson, Ball & Dowd
Washington Zone No. 6, D. C.

Item and Instruction No.	INCOME				
1.	Dividends	$ 32,764.	87		
2.	Interest on bank deposits, notes, corporation bonds, etc.	15,449	04		
3.	Income (or loss) from partnerships, syndicates, pools, etc., and income from other fiduciaries (Name and address)				
4.	Rents and royalties (from Schedule B)				
5.	Net gain (or loss) from sale or exchange of property other than capital assets (from Schedule C)				
6.	Net profit (or loss) from trade or business other than one defined as an unincorporated business (attach statement)				
7.	Adjusted gross income (or loss) from unincorporated business from all sources, line 26, Column 1, Page 1, Form D-30 (give name)				
8.	Other income (state nature of income)				
9.	Total income in items 1 to 8, inclusive (enter nontaxable income in Schedules A and/or A-1)			$ 48,213	51
	DEDUCTIONS				
10.	Interest (explain in Schedule D)	$ 10,693	04		
11.	Taxes (explain in Schedule D)				
12.	Other deductions authorized by law (explain in Schedule D)	349	07		
13.	Amount taxable at 5% on District Unincorporated Business Franchise Tax Return, line 33, Column 4, Page 1, Form D-30				
14.	Total deductions in items 10 to 13, inclusive			11,042	16
15.	Balance (item 9 minus item 14)			$ 37,171	35
16.	Less: Amounts distributable to beneficiaries (see Instruction J), exclusive of income taxable to an unincorporated business under the District of Columbia Income and Franchise Tax Act of 1947, as amended.				
	NAME OF BENEFICIARY / ADDRESS				
(a)	Caroline Kiernan Uline / 4740 Connecticut Ave. N. W., Wash., D. C.	$ 8,050	00		
(b)					
(c)					
(d)					
(e)					
(f)					
(g)					
(h)					
17.	Total (a to h, inclusive)			8,050	00
18.	Net income (item 15 minus item 17)			$ 29,121	35
19.	Less exemption ($1,000 for estates, $100 for trusts)			1,000	00
20.	Net taxable income (item 18 minus item 19)			$ 28,121	35
21.	Tax (See Tax Computation Instructions on Instructions for Form D-41)			$ 1,031	06
22.	Amount paid with this return (See Mailing Instructions below)			$ 1,031	06

Schedule A.—NONTAXABLE INCOME. (See Specific Instructions)

1. Source of income	2. Nature of income	3. Amount
		$

Schedule A-1—NONTAXABLE INCOME—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS

1. Description of property	2. Date acquired Mo. Day Yr.	3. Date sold or exchanged Mo. Day Yr.	4. Gross sales price	5. Depreciation allowed (or allowable) since acquisition (Furnish details)	6. Cost or other basis	7. Expense of sale and cost of improvements subsequent to acquisition	8. Gain or loss (column 4 plus column 5 minus the sum of columns 6 and 7)
			$	$	$	$	$
Total Net Gain (or Loss)							$

Enter Amount of Net Income Reported In Your Federal Return $ 15,782.24

Has the Internal Revenue Service, in the past 3 years, made or proposed any adjustments in Federal returns as originally filed by you? Yes ( ) No ( ) If so, attach a detailed statement explaining such adjustments unless previously submitted.

Mailing Instructions: Make check or money order payable to the D. C. Treasurer for amount in Item 22 above. Mail this return and remittance to the FINANCE OFFICE, REVENUE DIVISION, Municipal Center, Washington 1, D.C. on or before April 15, 1961

Schedule B.—INCOME FROM RENTS AND ROYALTIES (See Specific Instructions)

1. Kind and location of property	2. Amount received	3. Depreciation (explain in Schedule E)	4. Repairs	5. Other expenses (itemize below)	6. Net profit (enter as item 4, page 1)
	$	$	$	$	$

Explanation of deductions claimed in column 5 _____

Schedule C.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS
(See Specific Instructions)

1. Description of property	2. Date acquired Mo. Day Yr.	3. Date sold or exchanged Mo. Day Yr.	4. Gross sales price	5. Depreciation allowed (or allowable) since acquisition (explain in schedule E)	6. Cost	7. Expense of sale and cost of improvements subsequent to acquisition	8. Gain or loss (column 4 plus column 5 minus the sum of columns 6 and 7
			$	$	$	$	$
Gain or loss (enter net amount as item 5, page 1) _____							$

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items: _____

If any of the above items were acquired by you other than by purchase, explain fully how acquired: _____

Schedule D.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 10, 11, AND 12 (See Specific Instructions)

Schedule E.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

1. Kind of property (if buildings, state material of which constructed). Exclude land and other non-depreciable property	2. Date acquired	3. Cost or other basis	4. Depreciation allowed (or allowable) in prior years	5. Method of computing depreciation	6. Rate (%) or life (years)	7. Depreciation for this year
		$	$			$

QUESTIONS

1. Did you file a return of income with the District of Columbia for the year 1950? _____ If not, state reason _____

2. Date estate or trust was created _____

3. Check whether this return was filed on the cash ☐ or accrual ☐ basis.

4. If return is for a trust, does the trust instrument require or permit the accumulation of any portion of the income of the trust? _____

5. If return is for a trust, state name and address of grantor _____

DECLARATION (See Instruction R)

I declare under the penalties provided by law that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

_____
(Signature of fiduciary or officer representing fiduciary) (Date)

_____
(Address of fiduciary or officer)

(If this return was prepared for you by some other person, the following declaration must be executed)

DECLARATION (See Instruction R)

I declare under the penalties provided by law that I prepared this return for the person(s) named herein; and that this return (including any accompanying schedules and statements) is, to the best of my knowledge and belief, a true, correct, and complete return

_____
(Signature of person preparing the return) (Date)

_____
(Name of firm or employer, if any)

[Filed Sept. 30, 1963]

OPINION NO. 1018

DISTRICT OF COLUMBIA TAX COURT

ESTATE OF MIGIEL JOHN ULINE, deceased, M. ULINE PRATT and ELIZABETH R. STINE, Executrices, Petitioner, vs. DISTRICT OF COLUMBIA, Respondent.	)	DOCKET NO. 1871

FINDINGS OF FACT AND OPINION

The petitioner was assessed a substantial income tax deficiency for the calendar year 1960. It is here appealing from that assessment on the ground that it is based upon the erroneous determination of the assessing authority of the District of Columbia (a) that the amount of $555,591.82 was properly includible as taxable income resulting from a liquidating dividend paid by the M. J. Uline Company; and (b) that there was properly includible as taxable income the amount of $80,508.69 represented by a debt due by the petitioner to M. J. Uline Company, and forgiven by that company in 1960.

Findings of Fact

Some of the facts have been stipulated by the parties, and as stipulated are found by the Court. The Court makes other findings of fact as follows:

1. The paid-in capital of the M. J. Uline Company was $105,000. That amount was paid into the treasury of that corporation by the decedent, Migiel John Uline, who organized the corporation and was its only stockholder up to the time of his death on February 22, 1958.

2.(a) The amount of $80,508.69, and the amounts appearing each year on the books of the M. J. Uline Company as being owed by the

decedent, Migiel John Uline, to that corporation were considered by it as debts due by the decedent and were reported in its income tax returns as its assets.

(b) In some years the account showed a balance in favor of the deceased. No notes or other documents representing such indebtedness was given by the corporation to the decedent, and no interest was charged against, or paid by the corporation.

(c) The decedent considered the amounts appearing on the corporation's book as owed by him as debts due it. He repeatedly acknowledged that indebtedness in writing to certified public accountants auditing the corporation's books. He did not consider the amounts as dividends, and did not report them as taxable income in the yearly income tax returns which he filed with the assessing authority of the respondent.

(d) After the death of the decedent the M. J. Uline Company formally filed a claim against the petitioning estate with the Register of Wills, alleging in effect that Migiel John Uline at the time of his death was indebted to that corporation in the amount of $80,508.69. The petitioning executrices were officers of the claimant corporation. Later, as an exigency in a compromise settlement of an income tax deficiency or claim by the Federal government against the estate, the claim by the corporation against the estate was withdrawn.

Opinion

The deficiency in income tax from which the petitioner here appeals was based upon the determination of the assessing authority in effect (a) that the amount received by the petitioner upon the dissolution of the M. J. Uline Company, less paid-in capital, was taxable income; and (b) that the decedent, Migiel John Uline, at the time of his death was indebted to that corporation in the amount of $80,508.69; that such indebtedness was a valid claim against his estate; and that forgiveness of that indebtedness was taxable income to the estate. The Court is of the opinion that the determination of the assessing authority, and the assessment based

thereon were proper and valid. Its reasons therefor are the following:

Amount Received Upon Dissolution of M. J. Uline Company

The decedent, Migiel John Uline, organized the M. J. Uline Company. He invested or paid in as its capital $105,000. From the inception of the corporation to the death of the decedent on February 22, 1958, he was the owner of all its capital stock, consisting of 1053 shares. Upon his death the stock became an asset of his estate. It was held as an asset by the estate on December 28, 1960, when the corporation was formally dissolved, pursuant to the intention of its stockholders expressed by a resolution of December 16, 1959.

Prior to its dissolution the corporation sold all of its assets, consisting primarily of ice and area businesses and the real property in which the businesses were conducted, to another corporation for the amount of $725,000, payable in cash and promissory notes.

The liquidating distribution made by the corporation to the petitioning estate, as its sole stockholder, was detailed in a stipulation by the parties as follows:

"The net value of the entire liquidating distribution to Petitioner was $689,836.47 computed as follows:

May 3, 1960 distribution:			
Cash		$183,000.00	
Less Real Estate Tax Deposit		2,746.04	
Net cash distribution			$180,253.96
Balance due on notes of Uline, Inc.[1]			445,130.86
Net distribution of May 3, 1960			$625,384.82
December 14, 1960 distribution:			
Cash		$ 70,747.97	
By payment of Estate obligation to Ernst & Ernst		325.00	
Total distribution		$ 71,072.97	
Less Corporate Liabilities assumed by Estate:			
1960 Federal and D.C. Income and Franchise Taxes	$2,508.74		
1959 and 1958 Federal and D.C. Tax Deficiencies	3,894.73		
Acct. Payable — clock repair	217.85		
		6,621.32	
Net distributions of December 14, 1960			$ 64,451.65
Total net distribution			$689,836.47"

[1] It was stipulated that "the fair market value of these notes on May 3, 1960, was the balance due on the notes on that date."

For the purposes of Federal estate taxation the value of the 1053 shares of the capital stock of the M. J. Uline Company at the date of the death of the decedent was $657,072. The executrices, apparently believing that the tax treatment of the amount received by the estate in distribution was legally the same as that provided in the Internal Revenue Code, reported to the assessing authority of the District of Columbia the receipt of the distributed amount, less paid-in capital, as a conversion sale or disposition of a capital asset, and not as a dividend. In other words, they reported in an income tax return filed with the assessing authority that the estate had received $32,764.47 from the dissolution, which was the difference between the amount or value of the distribution, $689,836.47 and the value of the shares of stock at the decedent's death as determined for Federal tax purposes, $657,072.00. The assessing authority did not accept that report, and assessed a deficiency computed in part upon the $555,591.35, which was the difference between the entire distributed earned surplus of $588,355.82 and the amount $32,764.47, previously reported by the petitioner as taxable income.

Taxable gross income is defined in Section 47-1557a(a) of the District of Columbia Code in the language following:

> "The words 'gross income' include gains, profits, and income derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, including salaries, wages, and compensation paid by the United States to its officers and employees to the extent the same is not exempt under this subchapter, or income derived from any trade or business or sales or dealings in property, whether real or personal, other than capital assets as defined in this subchapter, growing out of the ownership, or sale of, or interest in, such property; also from rent, royalties, interest, dividends, securities, or transactions of any trade or business carried on for gain or profit, or gains or profits, and income derived from any source whatever."

In connection with the definition of "gross income", it should be observed that there is some confusion in the minds of counsel for petitioner. They seem to think that a dividend is not taxable gross income unless it

can be said to be a gain or profit. They would have the section, in so far as it relates to "dividends" read that "The words 'gross income' include gains, profits * * * from * * * dividends", whereas the correct reading is "The words 'gross income' includes * * * income from * * * dividends". The mistake is carried by counsel over to definition of "dividend" which is found in Section 47-1551c(m) of the Code. It reads as follows:

> "The word 'dividend' means any distribution made by a corporation (domestic or foreign) to its stockholders or members, out of its earnings, profits, or surplus (other than paid-in surplus), whenever earned by the corporation and whether made in cash or any other property (other than stock of the same class in the corporation if the recipient of such stock dividend has neither received nor exercised an option to receive such dividend in cash or in property other than stock instead of stock) and whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation: Provided, however, That in the case of any dividend which is distributed other than in cash or stock in the same class in the corporation and not exempted from tax under this subchapter, the basis of tax to the recipient thereof shall be the market value of such property at the time of such distribution: And provided, however, That the word 'dividend' shall not include any dividend paid by a mutual life insurance company to its shareholders."

What the petitioner is asking, or that upon which it is insisting is the same tax treatment by the assessing authority of the District as is provided in the Internal Revenue Code in respect of amounts received from or in connection with the dissolution of a corporation; in other words, that the amount received in excess of the basis, original or adjusted or stepped up, of the taxpayer's stock be considered capital gain. What the petitioner did in reporting income to the assessing authority, and what it here insists it had a right lawfully to do, was to deduct the stepped-up base of $657,072, arising from the death of, and transfer by the decedent, from the total distributed amount of $689,836.47, which was exactly what is permitted in the Internal Revenue Code, and which is exactly what was held not permissible in Berliner v. District of Columbia, 103 U.S. App. D.C. 351, 258 F.2d 651.

We find therein statements of the principle applicable here. They are, among others, the following:

> "It was stipulated in writing before the Tax Court that the distribution, to the extent taxed, was paid out of surplus, and the evidence showed that Erco had only earned surplus, to which the distribution was charged. The taxpayers make no contention to the contrary here. The distribution made by Erco, during or upon its liquidation, was thus out of 'its earnings, profits, or surplus,' earned in part from operations and in part on the sale of its assets in 1954. As such, it falls precisely within the statutory language and the imposition of the tax was required."
>
> (Here follows a discussion of early Revenue Acts.)
>
> "The District statute contains virtually the same definition of a dividend as the Federal statutes have contained since the 1916 Act, with the significant addition that in the District statute Congress included a specific provision that the term 'dividend' includes a distribution of earnings 'during, upon, or after liquidation.' Had Congress intended that such a distribution be treated as an exchange, we think it would have omitted the reference to liquidating distributions in the definition of a dividend and would have included a provision similar to that which has appeared in the Federal statutes uninterruptedly since 1924. We must therefore reject the taxpayers' contention that the transaction should be held to be an exchange, the gain from which is excluded from gross income by Section 47-1557a (b) (11)."

The argument of the petitioner that the assessment of the deficiency here under attack resulted in the taxing as income a bequest, which is not permitted under law, is without merit. The estate was the sole stockholder of the corporation. It was not compelled to effect its dissolution. The estate did so for its own purposes, with knowledge on the part of its executrices of the law as stated in Section 47-1551c(m) of the Code. True, upon the dissolution of the corporation the tax situation of the estate was different, and in a sense more burdensome than that of estates which hold stock passing from their decedents and sell or exchange it, but there is nothing improper or unconstitutional in that. Berliner v. District of Columbia, supra (page 356).

Equally without merit is the contention of the petitioner that what should be subtracted or deducted from the amount distributed in the dissolution of M. J. Uline Company, was not its invested or paid-in capital, called "paid-in surplus" in Section 47-1557a(a) of the Code, and amounting to $105,000, but the stepped-up basis resulting from the provision in Section 47-1583(c) that for the purpose of determining gain or loss the basis of property acquired by inheritance, where the transfer is taxable by the United States, "shall be the highest valuation then placed upon such transfer by the United States," which in this instance was $657,072. The difficulty with such argument or contention is that the law does not so provide. Section 47-1583(c) relates solely to the sale, exchange or other disposition of assets, which the Court of Appeals said in the Berliner case does not occur when a corporation is dissolved and its assets are distributed to the stockholders. In Dinkin v. District of Columbia, 89 W.L.R. 1293 (Part 2), the taxpayer claimed that his basis for the stock in L. S. Jullien, Inc. resulting from its purchase by him was that which should have been deducted from the amount which he received upon the dissolution of the corporation. This Court held otherwise in the language following:

> "Max Dinkin acquired stock in L. S. Jullien, Inc., by purchase from L. S. Jullien. The stock was issued to Jullien by the corporation upon the payment by him of $3,680.16, or upon the transfer to it of assets of that value. He sold the stock to the petitioner, Max Dinkin, for $9,421.00.
>
> "Section 47-1557a(a) [Section 2, Title III, D.C. Income and Franchise Tax Act of 1947.] District of Columbia Code, 1951 Edition provides that 'The words "gross income" include * * * dividends * * * .' Section 47-1551c(m) [Section 4(m), Title I, Ibid.] defines 'dividend' as follows:
>
> > 'The word "dividend" means any distribution made by a corporation (domestic or foreign) to its stockholders or members, out of its earnings, profits or surplus (other than paid-in surplus), whenever earned by the corporation and whether made in cash or any other property * * * and whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation: * * * .'

"The assessing authority of the District of Columbia considered or determined that the paid-in surplus of the corporation in relation to the stock here involved was what was received by the corporation from L. S. Jullien upon the issuance of the stock to him, that is to say, $3,680.16; and limited the deduction to that amount. On the other hand, the petitioners contend that the amount which the petitioner, Max Dinkin, paid Mr. Jullien for the transfer or assignment of the stock, that is to say, $9,421.00 represented paid-in surplus, and should have been deducted from the amount the petitioner received upon dissolution of the corporation.

"The Court must hold that the assessment was proper. Berliner v. District of Columbia, 103 U.S. App. D.C. 351, 258 F.2d 651, 86 W.L.R. 456. The sum of $3,680.16, and that only, was the paid-in surplus in relation to the 51 shares of stock which the petitioner, Max Dinkin, held."

Forgiveness of the Debt

For many years prior to the death of the decedent the M. J. Uline Company carried a running account with him. In most years it showed that he was indebted to the company, but in some years the company was the debtor. Neither the decedent nor the company paid interest on, or gave any notes or other documents to represent their respective indebtedness. At the time of his death the account showed that the decedent was indebted to the corporation in the amount of $80,508.69.

The officers of the corporation, who, incidentally, are the executrices of the decedent's estate, considered that the decedent owed the corporation $80,508.69, and that such indebtedness was a valid claim against his estate. They filed or caused to be filed with the Register of Wills a formal claim against the estate[2] in the amount stated.

The stated indebtedness resulted from the withdrawal by the decedent and the payment of sums for his account, totalling amounts in excess of his authorized salary and expense allowance ($25,000 and $2,000, respectively). The decedent did not consider those excess payments dividends. There is nothing in the record to show that he was dishonest or fraudulent.

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[2] In connection with the settlement or adjustment of a Federal income tax deficiency, and for purposes undisclosed in the record, the claim was subsequently withdrawn.

If he had considered them dividends he would have reported them as taxable income in his returns and paid an income tax thereon. As a matter of fact, he consistently informed the certified public accountants, who audited the accounts and affairs of the corporation, that the excess payments were debts. Several advantages accrued from the insistence by the decedent that they were debts. He was not required to report and pay income taxes thereon. The balance sheet of the corporation showed an asset equal to the indebtedness, which improved the credit of the corporation, which was completely owned by the decedent. It is too late now to say that the excess payments were dividends. The decedent made his bed, and his estate must lie in it.

In light of the foregoing there is no validity to the argument that the financial condition of the company would have permitted payment of dividends in amounts equalling the excess payments. The fact is that for personal, financial and corporate business purposes the decedent, who completely controlled the corporation, did not permit or authorize the declaration of dividends. That is a cold fact that cannot be brushed aside.

Conclusion

For the reasons stated the Court holds that a deficiency in income tax for the calendar year 1960, assessed against the petitioner in the amount of $31,805.03, and interest thereon in the amount of $3,339.53, were validly assessed against, and collected from the petitioner; and that the petitioner is not entitled to a refund thereof.

Decision will be entered for respondent.

/s/ Jo. V. Morgan
Judge

[Filed Sept. 30, 1963]

DECISION

This proceeding came on to be heard upon the petition filed herein; and upon consideration thereof, and of the evidence adduced at the hearing on said petition, it is, by the Court this 30th. day of September, 1963,

ADJUDGED AND DETERMINED, That a deficiency in income tax for the calendar year 1960, assessed against the petitioner in the amount of $31,805.03, and interest thereon in the amount of $3,339.53, or a total of $35,144.56, were validly assessed against, and collected from the petitioner; and that the petitioner is not entitled to a refund thereof.

/s/ Jo. V. Morgan
Judge

* * *

[Filed Oct. 24, 1963]

PETITION FOR REVIEW OF A DECISION OF THE DISTRICT OF COLUMBIA TAX COURT

To the Honorable Chief Judge and Circuit Judges for the
United States Court of Appeals for the District of Columbia Circuit:

1. Estate of Migiel John Uline, M. Uline Pratt and Elizabeth R. Stine, Executrices, petition for a review by the United States Court of Appeals for the District of Columbia Tax Court made in the above-entitled proceeding.

2. The decision of which review is sought affirmed a denial of a claim of refund of income tax and interest thereon which was assessed against and collected from petitioners for the calendar year 1960. The review which is sought is limited to that part of the decision which held that the amount received by petitioners upon the dissolution of M. J. Uline Company, less paid-in capital, was taxable income.

3. The decision of the Tax Court was entered on September 30, 1963.

/s/ Robert B. Yorty
Pierson, Ball & Dowd

* * *

October 24, 1963

REPLY BRIEF FOR PETITIONERS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,256

ESTATE OF MIGIEL JOHN ULINE, Deceased,
M. ULINE PRATT and ELIZABETH R. STINE, Executrices,

Petitioners,

v.

DISTRICT OF COLUMBIA,

Respondent.

PETITION TO REVIEW DECISION OF THE DISTRICT OF COLUMBIA TAX COURT

HAROLD DAVID COHEN
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Washington, D C 20036

Attorneys for Petitioners

March 14, 1964

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,256

ESTATE OF MIGIEL JOHN ULINE, Deceased,
M. ULINE PRATT and ELIZABETH R. STINE, Executrices,

Petitioners,

v.

DISTRICT OF COLUMBIA,

Respondent.

PETITION TO REVIEW DECISION OF THE DISTRICT OF COLUMBIA TAX COURT

REPLY BRIEF FOR PETITIONERS

I.

The respondent's position is that petitioners are taxable on a dividend distribution of $588,355.82, despite the fact that their basis for the stock surrendered in liquidation of the corporation was $657,072, only $32,764.47 less than the total liquidating distribution. Respondent urges that it is entitled to tax the amount of the dividend in full even though a major portion of it does not constitute a "gain, profit or income" to the estate but is, in fact, a recovery of its basis for the stock.

Respondent primarily relies upon the related Federal taxing statutes — particularly the Revenue Act of 1921 — in support of its posi-

tion.[1] Prior to the Revenue Act of 1916, the Federal Revenue Acts contained no definition of "dividend." In the absence of a definition, the Supreme Court in Lynch v. Turrish, 247 U.S. 221, and Lynch v. Hornby, 247 U.S. 339 held that the term "dividend" included ordinary dividends but not liquidating distributions. In the Revenue Acts of 1916, 1917 and 1921, a statutory definition of "dividend" was provided. It included all distributions made by the corporation out of earnings and profits since March 1, 1913. Accordingly, "dividends" under the Revenue Acts of 1916, 1917 and 1921 included liquidating distributions as well as ordinary dividend distributions and, in this respect, differed from the 1918 Act and statutes subsequent to 1921 which treated liquidating dividends as proceeds from the "sale or exchange" of the stock. For that reason, the 1916, 1917 and 1921 Acts were considered by this Court in the Berliner case[2] as furnishing an appropriate guide for interpreting the District of Columbia taxing statute.

Most of the cases under the Federal statutes which were cited by the Court in Berliner were cases in which the gain to the stockholder exceeded the amount of earnings and profits of the corporation since February 28, 1913. Therefore, the issue presented in the instant case was not involved.[3] In Hamilton Woolen Co., 21 B.T.A. 334 (1930) and Eric A. Pearson, 16 B.T.A. 1405 (1929), however, the instant issue was squarely

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[1] Respondent's reliance (Br., p. 9) upon Section 301(c)(1) of the Internal Revenue Code of 1954 is misplaced. That section applies only to ordinary dividends and not liquidating distributions. See Section 331 of the 1954 Code.

[2] Berliner v. District of Columbia, 103 U.S. App. D. C. 351, 258 F. 2d 651 (1958).

[3] Respondent mistakenly relies upon District of Columbia v. Oppenheimer, 112 U.S. App. D.C. 239, 301 F. 2d 563 (1962) as holding that the amount includible in gross income as a dividend is the amount which represents the earnings, profits, or surplus earned by the corporation. All that this case actually held was that the amount to be included as a dividend could not exceed the earnings, profits and surplus earned by the corporation. It did not hold that all amounts distributed which represent earnings, profits or surplus earned by the corporation are necessarily to be included in gross income simply because they come within the definition of a dividend.

presented, since in each of these cases the distributed earnings and profits subsequent to February 28, 1913 exceeded the stockholder's gain.

In the Hamilton Woolen and Pearson cases, the Government and the taxpayers presented different interpretations of the relevant provisions of the 1921 Act. The Government's position (as exemplified by the quotation from Article 1545 of Reg. 62 appearing on pages 22 and 23 of our main brief) was that only that portion of the earnings and profits that represented gain to the stockholder was to be included in gross income as dividends. The taxpayers, on the other hand, contended that the entire amount of earnings and profits should be treated as a dividend — even though it exceeded the gain derived from the liquidating distribution — and that the balance of the distribution should be compared with the recipients' basis for the stock of the corporation, with the resulting loss being recognized as a deduction.

Unlike the situation under the District statute with which we are concerned, it was important under the 1921 Act as to which view prevailed. Income taxes were then in the form of a normal tax at a flat rate of 8 per cent on income over $4,000 and a surtax at graduated rates starting with 1 per cent at a net income of between $5,000 and $10,000. Section 216 of the 1921 Act provided,however, that for the purpose of the normal tax, the taxpayer was to be allowed a credit of the amount received as dividends.

The significance of the opposing theories advocated in the Hamilton Woolen and Pearson cases lay in the difference in tax treatment afforded that portion of distributed earnings and profits which exceeded the stockholder's gain from the whole transaction. Under the Government's view, only those distributed earnings and profits which represented gain were includible in income, and then only for the purpose of applying the surtax. No gain or loss was recognized for normal tax purposes. Under the taxpayer's view, while the entire amount of the earnings and profits were included as a dividend for surtax purposes, the

amount of the earnings and profits which did not represent a gain was deducted as a loss both for normal and surtax purposes. Under the taxpayer's theory, therefore, he was left with a deductible loss in the amount by which the earnings and profits exceeded his gain, without any offsetting dividend income. The courts in these cases adopted the taxpayers' viewpoint and in doing so, of course, rejected the Internal Revenue approach.

The language which respondent quotes in its brief (p. 8) from 1 Mertens, Law of Federal Income Taxation, Section 9.89 (1962) refers only to the court's rejection of the Government's position. Respondent omitted from its quotation the statements which explain that this rejection was in favor of, and brought about by, the adoption of the theory presented by the taxpayers, and that this theory is essentially the same as the second of the alternative grounds for relief which we urged in our main brief (pp. 21-25).

To illustrate, the sentence which is omitted from respondent's brief, p. 8 (represented by the three asterisks at the end of the quotation at the top of that page) is as follows:

> "The remainder of the distribution should be used as the basis for computation of gain or loss.[14] "

The references which appear in footnote 14 to the Hamilton Woolen Company case and other cases which support our alternative position that we are entitled to an offsetting loss deduction were omitted from respondent's version. Respondent has omitted the material at the end of its quote at footnote 14 which further supports petitioners' position. Thus, the complete sentence, a portion of which was quoted by respondent at page 8 of its brief was as follows:

> "Accordingly any earnings or profits accumulated since February 28, 1913 received by the shareholder upon liquidation were correctly subject in full to the surtax and gain and loss was computed by comparing with the basis the total of all other proceeds of liquidation. In cases in which the total gain exceeded the earnings and profits accumula-

> ted since February 28, 1913, the result was the same under either rule. Where, however, the earnings and profits accumulated since February 28, 1913, exceeded the gain computed under the Treasury's method, the taxpayer lost the benefit of a deduction applicable against gross income for normal tax purposes equal to the difference."

Despite the statement in respondent's quotation from footnote 14 that the accumulated earnings and profits were "subject in full to the surtax," this was clearly not the case, since the offsetting loss deduction was also recognized for surtax purposes. Net income, therefore, included only that portion of the distributed earnings and profits which represented a gain to the stockholder from the entire transaction.

In none of the cases involving the 1921 Act has the court condoned the imposition of a tax upon that portion of a liquidating distribution which was in excess of the gain realized by the stockholder from the liquidation. This Court, we submit, should strike down the respondent's attempt to do so here.

Respondent attempts to answer the constitutional argument raised in our main brief (p. 17) by quoting from the decision in Berliner v. District of Columbia, supra (Br., p. 10). While this Court held that the constitutional argument raised in the instant case did not apply in Berliner, the very reason that the Court so held was because the distribution in that case represented a gain to the stockholder. Petitioners submit that, had the distribution in controversy in that case not been a gain to the stockholder, the Court would have ruled in the taxpayer's favor.

II.

In that portion of respondent's brief which is directed to the alternative ground for relief urged in our main brief (pp. 21-25), respondent recognizes the support given by the 1921 Act to petitioners' contention that they are entitled to an offsetting loss deduction. Respondent seeks to avoid the effect of this support by arguing that there are no provisions

in the District of Columbia income tax law comparable to Sections 201 and 202 of the 1921 Revenue Act.

While the definitions of "dividends" contained in Section 201(a) of the 1921 Act and Section 47-1551c(m) may differ in the language used, we submit that they have the identical legal effect in their application to liquidating distributions of the nature under consideration here. Moreover, the first portion of Section 47-1583 of the D. C. Code (1961) is practically identical to the basis provision of Section 202(a) of the 1921 Act, except for the reference to the February 28, 1913 cut-off date. It is true that there is no exact statutory counterpart in the D. C. income tax law to the provision of Section 201(c) of the 1921 Act. However, this section merely provides that distributions which do not represent earnings and profits, that is, distributions out of capital and paid-in surplus, are to be applied to reduce basis. Despite the absence of any specific statutory provision to that effect, the only reasonable construction of the statute as a whole is that distributions from capital and paid-in surplus are to be applied in the same manner under the District income tax law. Respondent does not indicate, nor are we able to conceive of, any other method of treatment.

If the amount of the dividend distribution does not reduce the petitioners' basis for their stock in the M. J. Uline Company, their basis, for purposes of computing the gain or loss realized on the disposition of the stock, must be $657,072. That portion of the distribution which does not represent earnings and profits and, therefore, is not a "dividend" can be the only amount which can reasonably be considered the proceeds of the disposition of the stock.

The loss of $555,591.35, determined by comparing these two amounts, is clearly deductible to the estate under the provisions of Section 47-1557b (a)(4)(B) of the District of Columbia Code (1961 Ed.). Respondent seeks to avoid this obvious result by asserting (Br., p. 13) that "the estate did not enter into a transaction." If respondent is contending that petitioners did not "enter into" the transaction because of the fact that its role in

the transaction was a passive rather than an active one, its contention is completely erroneous. In the first place, Section 47-1557b(a)(4)(B) does not require an "active" participation. Moreover, even if such a requirement were present, it would have been met by the fact that the approval of the estate as a stockholder was required and given before the Board of Directors could proceed with the liquidation and dissolution of the corporation. Finally, this contention is completely inconsistent with the Tax Court statement, quoted with approval by respondent (Br., pp. 9-10), that the petitioners were bound by the tax consequences of their decision to liquidate the corporation.

There is equally no merit to respondent's argument if it means to urge that there was no "transaction." It should be pointed out that the liquidating distributions which respondent now does not consider to be transactions were the very ones upon which respondent seeks to tax petitioners. If these taxable income distributions are to be ignored as "transactions" but considered to be merely a change in form of the ownership of the corporate assets by the sole stockholder, how can respondent justify taxing the major portion of these distributions as income to the stockholder? If the existence of the corporation as a separate legal entity is to be ignored for one purpose, it should be ignored for both.

The liquidating distributions of the M. J. Uline Company were initiated by petitioners and accompanied by a surrender and cancellation of the certificates for all of the issued and outstanding stock of that corporation held by the estate (J.A. 16, 23-24, 28-29). The estate voluntarily gave up all of its rights as a stockholder in return for the assets which were distributed to it in liquidation. Under these circumstances, it is difficult to see how the complete liquidation of the corporation would fail to be a "transaction entered into" by the estate as the sole stockholder which constitutes a "disposition" of the estate's stock in the M. J. Uline Company.

The Berliner case provides no support for respondent's contention

that there was no "other disposition" of stock. Berliner only held that a liquidating distribution is not considered to be "an exchange, the gain from which is excluded from gross income by Section 47-1557a(b)(11)." While, as Berliner held, Congress did not intend the "dividend" portion of a stockholder's gain from a liquidating distribution to escape taxation as a capital gain, neither did Congress intend to impose a tax on that portion of the liquidating distribution which merely restored to the stockholder his basis for the stock surrendered in the liquidation.

CONCLUSION

It is respectfully submitted that the decision of the Tax Court should be reversed and the case remanded for a computation of the refund to which petitioners are entitled on the issue involved in this appeal.

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March 14, 1964

BRIEF FOR RESPONDENT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,256

ESTATE OF MIGIEL JOHN ULINE, Deceased
M. ULINE PRATT and ELIZABETH R. STINE,
Executrices,

Petitioners,

v.

DISTRICT OF COLUMBIA,

Respondent.

ON PETITION FOR REVIEW OF A DECISION OF
THE DISTRICT OF COLUMBIA TAX COURT

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QUESTIONS PRESENTED

Where the M. J. Uline Company was dissolved pursuant to a plan of complete liquidation and dissolution adopted by its Board of Directors, and where amounts were thereafter distributed by said company to petitioners as sole stockholders, which amounts represented the earnings, profits, or surplus of the company on the date of dissolution, in the view of respondent, the questions presented are:

1. Was not the District of Columbia Tax Court correct when it held that, on complete liquidation of the company, the amounts distributed by it to petitioners, representing its earnings, profits, or surplus, were includible in petitioners' gross income as dividends and that said amounts could not be applied to reduce the basis of the stock in the hands of the stockholders?

2. Was not the District of Columbia Tax Court correct in holding that, under District law, the distribution made to petitioners on complete liquidation of the company did not result in a "sale, exchange, or other disposition" of petitioners' stock in the company and, thus, that petitioners did not sustain a deductible loss as a result of the liquidation?

INDEX
Subject Index

CASES CITED

* Cases principally relied upon are marked by asterisks.

STATUTES INVOLVED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ESTATE OF MIGIEL JOHN ULINE, Deceased M. ULINE PRATT and ELIZABETH R. STINE, Executrices,	)	
Petitioners,	)	Docket No.
v.	)	18,256
DISTRICT OF COLUMBIA,	)	
Respondent.	)	

BRIEF FOR RESPONDENT

COUNTER-STATEMENT OF THE CASE

The facts are correctly stated by petitioners in their statement of the case.

STATUTES INVOLVED

D.C. Code § 47-1551c(m) (1961).

The word "dividend" means any distribution made by a corporation (domestic or foreign) to its stockholders or members, out of its earnings, profits, or surplus (other than paid-in surplus), whenever earned by the corporation and whether made in cash or any other property (other than stock of the same class in the corporation if the recipient of such stock dividend has neither received nor exercised an option to receive such dividend in cash or in property

other than stock instead of stock) and whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation: Provided, however, That in the case of any dividend which is distributed other than in cash or stock in the same class in the corporation and not exempted from tax under this subchapter, the basis of tax to the recipient thereof shall be the market value of such property at the time of such distribution: And provided, however, That the word "dividend" shall not include any dividend paid by a mutual life insurance company to its shareholders.

D.C. Code § 47-1557a(a) (1961).

The words "gross income" include gains, profits, and income derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, including salaries, wages, and compensation paid by the United States to its officers and employees to the extent the same is not exempt under this subchapter, or income derived from any trade or business or sales or dealings in property, whether real or personal, other than capital assets as defined in this subchapter, growing out of the ownership, or sale of, or interest in, such property; also from rent, royalties, interest, dividends, securities, or transactions of any trade or business carried on for gain or profit, or gains or profits, and income derived from any source whatever.

D.C. Code § 47-1557b(a) (1961).

Deductions allowed.—The following deductions shall be allowed from gross income in computing net income:

* * *

(4) Losses.—Losses sustained during the taxable year and not compensated for by insurance or otherwise—

(A) if incurred in a trade or business; or

(B) if incurred in any transaction entered into for the production or collection of income subject to tax under this subchapter, or for the management, conservation, or maintenance of property held for the production of income subject to tax under this subchapter, though not connected with any trade or business;

* * *

D.C. Code § 47-1583 (1961).

The basis for determining the gain or loss from the sale, exchange, or other disposition of property shall be the cost of such property, except that—

* * *

(b) (3) In the case of property (including intangible personal property) acquired by gift or inheritance, where the transfer thereof to the taxpayer was subject to tax by the United States or by any jurisdiction in which the property had a taxable situs at that time, the basis of the property so acquired shall be the highest

valuation then placed upon such transfer by the United States or by any authorized taxing State or Territory thereof. If such transfer of the property was not subject to the aforesaid transfer tax, the base shall be the fair market value of such property at the time acquired. For the purpose of this subsection, the time such inherited property was acquired shall be the date of death of the decedent. The basis herein provided for shall be subject to the appropriate adjustment or adjustments defined in subsection (b) of this section.

D.C. Code § 47-1583a (1961).

(a) Computation of gain or loss.—The gain or loss, as the case may be, from the sale or other disposition of property shall be the difference between (a) the amount realized from such sale or other disposition of the property and (b) the basis as defined in section 47-1583.

Section 301 (c) (1), Internal Revenue Code of 1954.

Amount constituting dividend.—That portion of the distribution which is a dividend (as defined in section 316) shall be included in gross income.

Section 301 (c) (2), Internal Revenue Code of 1954.

Amount applied against basis.—That portion of the distribution which is not a dividend shall be applied against and reduce the adjusted basis of the stock.

SUMMARY OF ARGUMENT

Amounts distributed by a corporation to its stockholders, on dissolution of the corporation, which amounts represent the earnings, profits, or surplus of the corporation are fully taxable at ordinary income tax rates as dividends, and such amounts do not reduce the "basis" of the stock held by the taxpayer-stockholder.

Complete liquidation of a corporation, and the attendant liquidating distribution, is not to be treated as the "sale, exchange, or other disposition" of stock resulting in a gain or loss to the stockholder. Berliner v. District of Columbia, 103 U. S. App. D. C. 351, 258 F. 2d 651 (1958), cert. den. 357 U. S. 937 (1958).

ARGUMENT

I

Amounts distributed by a corporation to stockholders on complete liquidation, representing the earnings, profits, or surplus of the corporation, are includible in gross income as dividends.

D. C. Code, § 47-1557a (a), 1961, includes dividends within the definition of gross income. D. C. Code, § 47-1551c (m), 1961, defines a dividend as including

> "* * * any distribution made by a corporation (domestic or foreign) to its stockholders or members, out of its earnings, profits, or surplus (other than paid-in surplus), whenever earned by the corporation and whether made in cash or any other property * * * and whether distributed prior to, during, upon, or after liquidation or dissolution of the corporation:* * *."

In the District of Columbia, amounts distributed by a corporation to stockholders in complete liquidation of the corporation, less an amount equal to the capital paid in by the stockholders, are treated as dividends. Berliner v. District of Columbia, 103 U.S.App.D.C. 351, 258 F.2d 651 (1958), cert. den. 357 U.S. 937 (1958). The amount includible in gross income as a dividend to the stockholder-taxpayer is an amount which represents the earnings, profits, or surplus earned by the corporation and distributed to the stockholder. District of Columbia v. Oppenheimer, 112 U.S.App.D.C. 239, 301 F.2d 563 (1962).

Prior to any adjustments to reflect the liquidating distributions of May 3, 1960, and December 14, 1960, the capital account on the books of the M. J. Uline Company, as of December 14, 1960, the date of final liquidation, was $105,300.00, and the earned surplus account was $588,355.82. Thus, petitioners were properly required to include in gross income for the taxable year 1960, as dividends representing the earnings, profits, or surplus of the corporation distributed by it to them, the sum of $588,355.82.

Petitioners contend that "the estate was entitled to recoup the basis for its stock before it was chargeable with having received dividend income to the extent of the corporate earnings." (Pets' Br. p. 12.) The history of the related federal taxing statutes, discussed at length in the Berliner case, does not support this position. Under the Revenue Acts of 1916, 1917, and 1921 there was no specific provision as to the treatment of distributions in complete liquidation. This Court, in Berliner, stated:

> "* * * In cases governed by those acts it has been uniformly held that distributions in liquidation, whether partial or complete, fell within the definition of a dividend to the extent that they represented accumulated earnings, and thus were properly taxable as a dividend. * * *
>
> The District statute contains virtually the same definition of a dividend as the Federal statutes have contained since the 1916 Act, with the significant addition that in the District statute Congress included a specific provision that the term 'dividend' includes a distribution of earnings 'during, upon, or after liquidation.' * * *."
> (103 U.S.App.D.C. 354.)

Under the 1921 Revenue Act, the amount of a dividend distribution could not be applied to reduce basis, nor was the taxpayer entitled to recoup the basis of its stock before it was chargeable with having received dividend income to the extent of the corporate earnings. This is discussed in 1 MERTENS, LAW OF FEDERAL INCOME TAXATION, § 9.89 (1962):

> " * * * There is no doubt that Congress in the 1921 Act intended its definition of dividends to include liquidating dividends to the extent of 'earnings or profits accumulated since February 28th, 1913,' such earnings or profits when distributed being subject to the surtax and exempt from the normal tax. * * *.[14]"

Here, as under the Revenue Act of 1921, the distributions to petitioners of the earnings, profits, or surplus of the corporation on liquidation did not, as petitioners contend, reduce the basis of

---

Footnote 14 states in pertinent part:

> " * * * The decisions cited in this and preceding footnotes were at variance with early rulings of the Service holding that the taxpayer was to take into account the total proceeds of liquidation (including 'earnings or profits' accumulated after February 28, 1913), and if the total as compared to the basis (cost or value as of March 1, 1913) showed a gain, then such part of the gain as represented 'earnings or profits' accumulated after February 28, 1913, should be taxed as ordinary dividends subject to surtax only, while the balance should be taxable as capital gains subject to both the normal tax and the surtax. If the amount received by the stockholders in liquidation (including the 'earnings or profits' accumulated after February 28, 1913), was less than the basis, a deductible loss was sustained applicable against gross income for both normal and surtax purposes. * * * These rulings ignored the fact that under requirements of the 1921 law a distribution of earnings or profits accumulated since February 28, 1913, did not reduce basis. Accordingly any earnings or profits accumulated since February 28, 1913, received by the stockholders upon liquidation were correctly subject in full to the surtax * * *." (Emphasis supplied.)

the stock of the M. J. Uline Company, nor were petitioners entitled to recoup the basis for the stock from amounts which were properly taxed as dividend distributions.

By comparison, section 301 (c) (1) of the Internal Revenue Code of 1954 states that that portion of a distribution which is a "dividend", as defined by section 316 of the Code, is to be included in gross income and therefore is taxable at ordinary income rates. Section 301 (c) (2) states that it is only that portion of the distribution which is not a "dividend" which is to be applied against and reduce the basis of the stock in the hands of the stockholder.

Petitioners further assert that "if the estate is required to include all amounts received in the liquidation of the corporation in its gross income without regard to the value (i.e., basis) of the stock acquired from the decedent, such value will in practical effect often be subject to income taxes, notwithstanding the provisions of the statute." [1] (Pets' Br. p. 21.) But, as the Tax Court's opinion pointed out:

> "The argument of the petitioner that the assessment of the deficiency here under attack resulted in the taxing as income a bequest, which is not permitted under law, is without merit. The estate was the sole stockholder of the corporation. It was not compelled to effect its dissolution. The

1. i.e., D.C. Code § 47-1557a(b) (3).

> estate did so for its own purposes, with knowledge on the part of its executrices of the law as stated in Section 47-1551c(m) of the Code. True, upon the dissolution of the corporation the tax situation of the estate was different, and in a sense more burdensome than that of estates which hold stock passing from their decedents and sell or exchange it, but there is nothing improper or unconstitutional in that. Berliner v. District of Columbia, supra (page 356)." (J.A. 40.)

Petitioners also assert that the tax treatment accorded the dividend distribution involved here was "outside the bounds of due process and hence violative of the Fifth Amendment." (Pets' Br. p. 17.) This argument was disposed of in the Berliner case, supra, where this Court said:

> "Finally, the taxpayers contend that the Fifth Amendment prohibits taxation as dividends of amounts distributed in liquidation to the extent that they represent corporate earnings. Their argument is two-fold: that to do so taxes the stockholder on the earnings of another entity, the corporation, and that it arbitrarily and capriciously provides a different treatment from that afforded stockholders who sell their stock to third persons. The first point, if accepted, would prohibit the taxation of any distribution of corporate earnings to a stockholder as a dividend. But, of course, the point cannot be accepted. Cf. United States v. Phellis, 1921, 257 U.S. 156, 169, 42 S.Ct. 63, 66 L.Ed. 180. In respect of the taxpayers here the argument overlooks the fact that the distributions not only returned to them their capital investments in full but also a substantial additional amount as a gain or profit. The question is whether the Fifth Amendment permits Congress to tax this profit as dividend income, when it also represented a distribution of corporate earnings. The courts have frequently recognized that a distribution of earnings in liquidation

may rationally be treated as a dividend as well as an exchange. It was constitutionally open to Congress to elect to tax the profit as a dividend for purposes of the District tax, just as it was constitutional for it to do so for purposes of the 1921 Federal Act. Commissioner of Internal Revenue v. Sansome, supra, note 11, 60 F.2d at page 932. Cf. Neild v. District of Columbia, 1940, 71 App.D.C. 306, 110 F.2d 246." (103 U.S.App.D.C. 355-356.)

II

Petitioners did not sustain a deductible loss on dissolution of the corporation.

In the alternative, petitioners contend that, assuming the estate was required to include in gross income as a dividend distribution an amount equal to the earned surplus of the corporation at the time of liquidation, then the estate was entitled to offset against this a loss on the disposition of its stock, pursuant to D.C. Code § 47-1557b(a) (4) (B), equal to the difference between the estate's basis for the stock and that portion of the liquidating distribution not included in gross income as a dividend. Petitioners' contention is based, by analogy, on Sections 201 and 202 of the Revenue Act of 1921, and the cases decided thereunder. Sections 201 and 202 stated in pertinent part:

> "Sec. 201. (a) That the term 'dividend' when used in this title (except in paragraph (10) of subdivision (a) of section 234 and paragraph (4) of subdivision (a) of section 245), means any distribution made by a corporation to its shareholders

or members, whether in cash or in other property, out of its earnings or profits, accumulated since February 28, 1913, except a distribution made by a personal service corporation out of earnings or profits accumulated since December 31, 1917, and prior to January 1, 1922.

* * *

(c) Any distribution (whether in cash or other property) made by a corporation to its shareholders or members otherwise than out of (1) earnings or profits accumulated since February 28, 1913, or (2) earnings or profits accumulated or increase in value of property accrued prior to March 1, 1913, shall be applied against and reduce the basis provided in section 202 for the purpose of ascertaining the gain derived or the loss sustained from the sale or other disposition of the stock or shares by the distributee.

* * *

Sec. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property * * *."

Pursuant to these statutory provisions, distributions, insofar as they represented the earnings and profits of a corporation accumulated after February 28, 1913, constituted dividends, and the remainder of any such distribution was used as the basis for computing gain or loss under section 202. Hamilton Woolen Co., 21 B.T.A. 334 (1930); 1 MERTENS LAW OF FEDERAL INCOME TAXATION, supra.

The District of Columbia Income and Franchise Tax Act of 1947, as amended, does not contain provisions applicable to

corporate dissolutions comparable to Sections 201 and 202 of the Revenue Act of 1921. Respondent submits that, absent a statutory provision allowing a deductible loss, none can be claimed. Petitioners rely solely on D.C. Code § 47-1557b(a) (4) (B) (1961), which states:

> "(4) Losses.—Loss sustained during the taxable year and not compensated for by insurance or otherwise—
>
> * * *
>
> (B) if incurred in any transaction entered into for the production or collection of income subject to tax under this subchapter * * *."

Assuming, arguendo, that the estate did incur a loss, nevertheless the estate's loss was not incurred in a transaction entered into for the production of income or a transaction entered into for the collection of income. The M. J. Uline Company, a legal entity separate and distinct from the estate, was dissolved and the proceeds of dissolution were distributed to the estate-shareholder as the sole shareholder of the outstanding stock. As such, the estate did not enter into a transaction. It received the proceeds of dissolution solely in its capacity as a shareholder.

D.C. Code § 47-1583a(a) (1961) states:

"Computation of Gain or Loss.—The gain or loss, as the case may be, from the sale or other disposition of property shall be the difference between (a) the amount realized from such sale or other disposition of the property and (b) the basis as defined in section 47-1583."

D.C. Code § 47-1583 (1961) provides in pertinent part:

"The basis for determining the gain or loss from the sale, exchange, or other disposition of property shall be the cost of such property, except that—

* * *

(b) (3) In the case of property (including intangible personal property) acquired by gift or inheritance, where the transfer thereof to the taxpayer was subject to tax by the United States or by any jurisdiction in which the property had a taxable situs at that time, the basis of the property so acquired shall be the highest valuation then placed upon such transfer by the United States or by any authorized taxing State or Territory thereof. If such transfer of the property was not subject to the aforesaid transfer tax, the base shall be the fair market value of such property at the time acquired. For the purpose of this subsection, the time such inherited property was acquired shall be the date of death of the decedent. The basis herein provided for shall be subject to the appropriate adjustment or adjustments defined in subsection (b) of this section."

Under the District's statute, gain or loss is dependent upon "sale, exchange, or other disposition of property". The shares of stock in the M. J. Uline Co. held by petitioners were simply evidence of the proprietary interest of petitioners in that company. The number of shares held compared with the entire amount of shares outstanding

determined the amount which petitioners would be entitled to receive upon dissolution of the corporation. See Affiliated Government Employees' Distrib. Co. v. C.I.R., 322 F.2d 872 (1963); In Re Muhfeld's Will, 157 N.Y.S. 2d 302 (1956). When the company dissolved, petitioners received in dissolution the assets of the company resulting from their ownership of the company's stock. Berliner clearly demonstrates that petitioners were not, upon dissolution of the M. J. Uline Company, involved with a "sale, exchange, or other disposition" of their stock and, thus, the gain or loss provisions of the District's taxing statute are not applicable.

CONCLUSION

It is respectfully submitted that the decision of the District of Columbia Tax Court affirming the assessments of additional income taxes for the taxable year 1960, was correct and should be affirmed.

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ANSWER OF RESPONDENT, DISTRICT OF COLUMBIA, TO PETITION FOR REHEARING EN BANC

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,256

ESTATE OF MIGIEL JOHN ULINE,
Deceased, M. ULINE PRATT and
ELIZABETH R. STINE, Executrices,

Petitioners,

v.

DISTRICT OF COLUMBIA,

Respondent.

ON PETITION FOR REVIEW OF A DECISION OF THE
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ESTATE OF MIGIEL JOHN ULINE, Deceased, M. ULINE PRATT and ELIZABETH R. STINE, Executrices, Petitioners,	)	
v.	)	No. 18,256
DISTRICT OF COLUMBIA, Respondent.	)	

ANSWER OF RESPONDENT, DISTRICT OF COLUMBIA, TO PETITION FOR REHEARING EN BANC

On the ground, chiefly, that Uline was briefed and argued prior to the time that Snow v. District of Columbia, No. 19,232, decided November 22, 1965, reached the Court, and that it is their view that the decision in Snow should be applicable here, petitioners request that the Court rehear the above-entitled case en banc.

The facts in Snow are markedly different from those in Uline. For $1,000,000.00 in cash and a secured note, Snow purchased from one Guy all of the stock of a corporation known as Lombardy, Inc. Immediately thereafter Snow, as the sole stockholder, liquidated the corporation, transferring to himself all the assets of the corporation, among which, as shown on the books of the corporation, was the sum of $300,000.00, representing earned surplus. The Court concluded

in Snow that the taxpayer, although receiving $300,000 in taxable dividends, nevertheless sustained a loss of the same extent since, disregarding the dividends, he received upon dissolution only $700,000.00 of his cost basis of $1,000,000. As the Court said in its Opinion:

> "We hold in the first of these two cases that Snow received a taxable dividend of $300,000 when he received the earned surplus of the corporation, and that he sustained a deductible loss of $300,000 when in the other part of the transaction he received $700,000 of assets in return for the surrender of stock for which he had paid $1,000,000 in cash."

To the contrary, in Uline the cost to, or investment made by, Mr. Uline for the stock of the M.J. Uline Co. was $101,480.65. Of a total distribution of $689.836.47 to the executrices upon dissolution of the company, $588,355.82 represented earned surplus. Snow, upon dissolution of Lombardy, Inc., received from the corporation exactly the amount he had invested, whereas here the executrices received $588,355.82 more than the amount originally invested. Clearly, the circumstances involved in the two cases are significantly different.

Moreover, the decision in Snow was considered by the Court in its opinion of March 3, 1966 in Uline. Direct reference to that case is found at page 4 of the slip opinion. Thus, it appears that no substantial question not already previously fully considered by the Court could be presented by the executrices of Mr. Uline's estate upon a rehearing of the case en banc, nor could reliance upon Snow in any way affect the resolution of the issues presented in Uline.

For these reasons, it is respectfully submitted that the decision of the Court in this case was correct in all of its aspects, and that the petition for rehearing en banc should be denied.

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IN THE UNITED STATES COURT OF APPEALS
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ESTATE OF MIGIEL JOHN ULINE, Deceased,
M. ULINE PRATT and ELIZABETH R. STINE,
Executrices,

Petitioners,

v.

DISTRICT OF COLUMBIA,

Respondent.

No. 18,256

PETITION FOR REHEARING EN BANC

Petitioners respectfully request the Court to grant rehearing en banc of the above-entitled case. The problem involved is of fundamental importance in the administration of the tax laws of the District of Columbia as they apply to decedents' estates, 1/ and should be re-examined by the full Court in the light of a highly relevant opinion of the Court filed by another panel after this case was submitted.

The instant case was briefed and argued prior to the time that Snow v. District of Columbia, No. 19,232, decided November 22, 1965, rehearing en banc denied February 1, 1966, reached this Court. The Snow decision delineated the proper tax treatment of distributions in complete liquidation of corporations. Both petitioners' and the District's briefs and oral arguments in the instant case were directed primarily to the broad issue subsequently resolved by Snow.

1/ For example, Goldstein v. District of Columbia, Docket No. 18,488, has been deferred until the outcome of the instant case.

Therefore, neither party discussed, except in a cursory fashion, the precise point on which the instant decision turned, to wit, whether or not, in applying Snow to the case of a corporate liquidation by executors of a decedent's estate, the tax basis for stock surrendered by the estate is the cost to the decedent from which it acquired the stock or, rather, the value of the stock at decedent's death. We request the opportunity to submit full briefs on this point and, if the Court deems it appropriate, further oral argument. We believe that upon deliberation by the full Court the instant decision will be seen to be erroneous.

Snow qualified Berliner v. District of Columbia, 103 U.S. App. D.C. 351, 258 F.2d 651, cert. denied, 357 U.S. 937 (1958). It held that although a distribution in complete liquidation, to the extent that it represents earned surplus of the corporation, is a taxable dividend, the recipient is entitled to an offsetting loss against the dividend to the extent that his basis for the stock exceeds the non-dividend portion of the distribution. In this manner, the Court in Snow accommodated Berliner to fundamental concepts of income tax law. In our view, the result in the instant case effectively nullifies the Snow rationale in the case of estates.

The facts here are undisputed. On February 22, 1958, when Migiel John Uline died, he owned all of the outstanding stock of M. J. Uline Company which he had organized some years previously. On December 31, 1959, petitioners, the executrices of the Estate, adopted a plan of liquidation, pursuant to which the corporation sold all of its assets. After paying debts, the net

proceeds, aggregating $689,000, 2/ were distributed to petitioners on May 3, 1960 and December 14, 1960.

Mr. Uline's investment in the stock of the corporation had been $101,000. When the Estate acquired the stock upon Mr. Uline's death, the stock was worth $657,000. Petitioners paid estate and inheritance taxes on the basis of that higher valuation. In its District of Columbia income tax return, the Estate reported as a taxable dividend the amount of $32,000, representing the difference between the total distribution of $689,000 and the value of the stock at decedent's death. The taxing authorities imposed a deficiency on the ground that the corporate books showed an earned surplus of $588,000 and, therefore, this amount constituted a taxable dividend to the Estate.

The Court upheld the District's determination and rejected petitioners' contention that if the amount of $588,000 was a taxable dividend, the Estate was entitled to an offsetting loss equal to the difference between its basis for the stock surrendered on the liquidation and the non-dividend portion of the distribution. In the opinion for the Court, filed by Judge Danaher, it is stated that the Estate had not sustained a loss because the "investment" of the decedent was only $101,000. The Court held that the basis of stock in the hands of the Estate was no different from its basis when held by the decedent. We respectfully urge that the validity of this novel conclusion should be examined by the full Court.

2/ For simplicity, round figures are used herein.

The precise issue on which rehearing is sought is how the Berliner doctrine, as qualified by Snow, is to be applied when the recipient of the liquidating distribution is an estate which, unlike the individuals in Berliner and Snow, does not have a "cost" basis for the stock of the liquidating corporation. More specifically, the question is whether the decedent's cost for the stock or the value of the stock at date of death should be used as the Estate's basis for the stock in measuring the offsetting loss deduction.

Since Snow was not even before this Court until long after the instant case was argued, neither petitioners nor the District had the benefit of the teaching of Snow when they briefed and argued this case. The District argued that the basis of the Estate's stock which was turned in upon the dissolution of the corporation was wholly irrelevant to the tax treatment of the distribution. It relied upon Berliner as having established that amounts distributed by a corporation which represent earned surplus are taxable as a dividend regardless of whether or not the cost or other basis of the stock is recouped by the stockholder. The District also advanced the argument (subsequently repudiated by this Court in Snow)that there could be no offsetting loss because no part of the distribution was received by the Estate in return for the stock which it surrendered. But at no time did the District controvert petitioners' assertion that the Estate's basis for the stock was "date of death value." Instead the position which it took was that it was unnecessary even to consider the basis of the stock.

The Court's conclusion that the Estate's basis of the stock was limited to the "investment" of the decedent is of extremely doubtful validity in view of conflicting decisions of the Supreme Court. Briefs and argument on the

point are warranted. This is particularly so, we submit, since by limiting the basis for the Estate's stock to the decedent's cost and thereby effectively foreclosing any offsetting loss against the dividend portion of the distribution, the Court undermined the rationale by which Snow reconciled Berliner with fundamental principles of tax law.

The Supreme Court has held that the basis of property acquired by an estate "by bequest, devise or inheritance" is the value of that property at the decedent's death, and not the cost to the decedent. Hartley v. Commissioner, 295 U.S. 216 (1935); Brewster v. Gage, 280 U.S. 327 (1930). This principle has been recognized in numerous cases. See, e.g., Maguire v. Commissioner, 313 U.S. 1, 61 S. Ct. 789 (1941); Herbert's Estate v. Commissioner, 139 F.2d 756 (3d Cir. 1943), cert. denied, 322 U.S. 752 (1944); Helvering v. Roth, 115 F.2d 239 (2d Cir. 1940); Commissioner v. Matheson, 82 F.2d 380 (5th Cir. 1936); Cooke v. United States, 40 F. Supp. 22 (E.D. Pa. 1941). It is our position that the District of Columbia Income and Franchise Tax Act of 1947 (D.C. Code Section 47-1583(b)(3) (1961 ed.)), which is the statute in question, is essentially the same and reflects a confirmation by Congress of the well-established rule that the time when inherited property is acquired by an executor is the date of death of the decedent. The 1947 enactment modified an earlier statute so as to provide that the highest value of any governmental assessment for estate or inheritance tax purposes would be taken as establishing the basis of the property acquired; otherwise, fair market value at the time of death would constitute the basis, as had previously been the case. At no time did Congress express an intent that the decedent's cost should constitute the basis to the estate.

The Court in the instant case implied that the basis for the corporate stock would have been different if it had been held by a legatee who had acquired it by inheritance, rather than by the Estate (slip opinion, p. 4, n. 10). Moreover, the Court indicated that the Estate stood in no different position than if the decedent during his lifetime had caused his corporation to be liquidated and had distributed the proceeds to himself as sole stockholder. But, as has repeatedly been pointed out, an executor does not stand in the shoes of the decedent but rather in the shoes of the beneficiaries of the estate. See, e.g., Anderson v. United States, 15 F. Supp. 216, 223 (Ct. Cl. 1936). The legal role of executor-administrator was a major issue which was considered by the Supreme Court in Brewster v. Gage, supra. The Court there stated in part (280 U.S. at 334):

> "[T]here vests in the administrators or executors, as of the date of the death, title to all personal property belonging to the estate; it is taken not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue . . . ."

From this, the Court concluded that the valuation basis of property as to both estates and residuary legatees was the value at the time of the decedent's death. 280 U.S. at 335-36.

In the absence of any evidence of Congressional intent to the contrary, we presume that Congress, in enacting the basis provisions for the District of Columbia Code, did not intend to create a hardship or to bring about unjust consequences by subjecting the value of an estate's assets to both income taxation and estate and inheritance taxation. It frequently happens that an estate must liquidate a corporation in order to obtain the necessary funds with which to pay estate and inheritance taxes. An estate which, as in this

case, has paid estate and inheritance taxes based on the fair market value of the corporation's stock at the decedent's death should in all equity receive a stepped-up basis for the purposes of income taxation with respect to the liquidating distribution. See Hartley v. Commissioner, 72 F.2d 352, 355 (8th Cir. 1934), aff'd 295 U.S. 216 (1935); Bankers Trust Co. v. Bowers, 23 F.2d 941, 943 (S.D. N.Y. 1928).

As a corollary to being charged with having received a taxable dividend, the Estate in all fairness should receive an offsetting loss against income measured by the difference between the stepped-up basis and the non-dividend portion of the distribution. So far as the Estate and the beneficiaries are concerned, the non-dividend portion was a return of "what the stockholder already had" (Snow, slip opinion, p. 6). The position of the Estate is essentially no different from the position of the purchaser of the corporate stock in the Snow case who was permitted an offsetting loss.

The Court's opinion contains a footnote comment to the effect that decedent had died more than two years before the liquidating distributions were made (slip opinion, p. 5, n. 12). If this statement was intended to mean that the Estate had no offsetting deduction because loss from the "sale or exchange" of a "capital asset" (property held more than two years) cannot be deducted from gross income (D.C. Code Section 47-1557 b(b)(6)), this provides an additional reason for the Court en banc to examine the instant case. In disallowing losses on the sale or exchange of capital assets, Congress legislated a reciprocal provision to the non-recognition of capital gain under District of Columbia law (Section 47-1557 a (b)(11). An injustice is created if, on the one hand, an estate or any other distributee, for that matter,

is required to include liquidating distributions in its gross income to the full extent of the corporate earned surplus while, on the other hand, it is prohibited from offsetting the loss which it incurred in the same transaction. The prohibition against taking capital losses was not designed to apply to this type of disposition. It may be noted that the District of Columbia statute does not bar losses on a "disposition" of capital assets which is other than a "sale or exchange." Compare D.C. Code, Section 47-1557 b (b)(6) with D. C. Code, Section 47-1583. See, also, D. C. Code, Section 47-1583 d. Furthermore, the Code cannot, consistently with basic concepts of income taxation, be properly construed to mean that losses to the taxpayers' investment or basis must be disallowed by a two-year rule where they are used only to offset taxable dividends. We suggest that the result reached in Snow would have been required even if the taxpayer had held the stock for more than two years.

In summary, the Court should hold that the basis of an estate's assets in a Berliner and Snow situation is the "date of death value" of the stock and not the decedent's cost. The difference between such basis and the non-dividend portion of a liquidating distribution should be held to be an offsetting loss against the taxable dividend.

CONCLUSION

For the foregoing reasons, we respectfully urge this Court to grant a rehearing en banc and, if the Court deems it appropriate, further oral argument.

Respectfully submitted,

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March 18, 1966

I hereby certify that this Petition for Rehearing En Banc is presented in good faith and not for delay.

Harold David Cohen

Certificate of Service

This is to certify that on this 18th day of March, 1966, the foregoing Petition for Rehearing En Banc was served upon respondent by mailing a copy thereof, postage prepaid, to Henry E. Wixon, Esq., Office of Corporation Counsel, District Building Washington, D. C.

J. Laurent Scharff